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**THESIS**

**ENSURING THE END GAME: FACILITATING THE USE  
OF CLASSIFIED EVIDENCE IN THE PROSECUTION OF  
TERRORIST SUBJECTS**

by

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March 2010

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## **ABSTRACT**

The advancement and access of technology by terrorism subjects who plan and operate from under-governed or lawless lands has forced the U.S. to consider the demands the international threat environment places upon its security. More importantly is how the U.S. will adapt to meet these threats, prevent attacks and convict those who mean to do the nation harm. This thesis contends the modern day terrorism threat falls within the seams of the military, intelligence and law enforcement disciplines. The threat requires the fusion of these elements of national power to prevent attacks, collect vital intelligence and facilitate the use of key evidence to achieve substantive convictions. In order to achieve convictions the need for damning evidence is essential. However, with the fusion of the military, intelligence and law enforcement disciplines comes the problem of utilizing classified information as evidence to achieve end game convictions of capture terrorist subjects. The recommendations in this thesis can facilitate the use of classified intelligence as evidence by establishing a legal U.S. preventative detention system, a full and permanent integration of FBI personnel with SOCOM assets and establishing NCTC as a central planning and coordinating organization with the authority to direct counterterrorism operations.

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## I. INTRODUCTION

*I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments...After the chaos and carnage of September 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.*

President George W. Bush, State of the Union Address, January 20, 2004

*The chief mission of U.S. law enforcement...is to stop another attack and apprehend any accomplices to terrorists before they hit us again.*

Attorney General John Ashcroft, National Security Council Meeting, September 12, 2001(as reported by Bob Woodward in Bush at War)

On September 11, 2001, 19 foreign terrorists committed the largest and most deadly terrorist attack on the United States of America. The attackers succeeded in killing several thousand innocent persons, severely impacted the U.S. economy, and instilled a fear and revealed vulnerabilities that the country had never previously experienced. As a result, in an attempt to prevent and mitigate any future attacks, agencies were reorganized, new ones were created, and an offensive military strategy was adopted.

The implementation of the offensive military strategy by the United States and its allies have required them to deal with the results of using both armed forces and criminal investigative tools to bring terror perpetrators to justice (Scheffer, 2001). The success of this “prevention-first” counterterrorism scheme is evidenced by the lack of a successful internationally orchestrated domestic attack in over eight years, the disruption of 28 terrorist plots against the U.S. homeland (McNeill, 2009) and hundreds of captured suspected terrorist operatives and enemy combatants. Included in this group are High Value Detainees (HVDs), considered some of Al Qaeda’s most senior operatives and planners, among them: Khalid Sheik Mohammad, Abu Faraj Al-Libi and Riduan bin Isomuddin Hambali (DefenseLink, 2009). As Supreme Court university scholar Howard Ball indicates, the stated principal purpose for designating those captured on and off the

battlefield as “unlawful enemy combatants,” and not as Prisoners of War (POW),<sup>1</sup> was to authorize interrogations of those individuals to gain actionable intelligence information regarding the military plans of the enemy (Ball, 2007). It was also to incapacitate the terrorist subject from rejoining his radical organization. However, once interrogation and intelligence collection were completed, the critical question became what legal process should be and could be undertaken to punish and incapacitate them? In other words, what was the “endgame?” A subsequent and equally important question is, “who is coordinating the endgame?”

## A. PROBLEM STATEMENT

In 2008, at the direction of the Director of National Intelligence (DNI), the National Counterterrorism Center (NCTC)<sup>2</sup> through the Senior Inter-Agency Strategy Team (SIST)<sup>3</sup> (Maguire 2008) identified strategic impediments to meeting objectives as outlined in the National Implementation Plan for the War on Terrorism (NIP). These impediments or problems, if not addressed, would adversely impact the capability of agencies from successfully meeting their respective NIP objectives. One such identified impediment, and the central problem to be addressed in this thesis, is the lack of central leadership or permanent interagency structure that can strategically facilitate the proper collection, handling and disposition of classified intelligence information for use as evidence in the prosecution of terrorist subjects (Best, 2010; NCTC, 2008).

Not addressing this issue will place the United States and its allies in a difficult predicament on how to lawfully dispose of terrorists once they have been exploited for their intelligence value. The problem on how and where the 20 or so HVDs in

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<sup>1</sup> The Third Geneva Convention of 1949 does not permit the interrogations of POWs nor physical or mental torture or any form of coercion to obtain information of any kind outside of name, rank and identification number.

<sup>2</sup> National Counterterrorism Center (NCTC), authorized under the Intelligence Reform and Terrorism Prevention Act of 2004, is responsible for strategic operational counterterrorism planning which integrates all elements of national power. NCTC is responsible for ensuring U.S. government-wide assimilation of counterterrorism intelligence and operations, cutting across agency boundaries both domestically and internationally. This planning is manifested in the National Implementation Plan for the War on Terror (NIP), approved by President Bush in June 2008. (NCTC, 2008)

<sup>3</sup> The SIST is comprised of senior representatives from all the participating inter-agency partners who are assigned to NCTC for two-year increments to develop the NIP.

Guantanamo Bay will be tried while being able to fully capitalizing on, at a minimum, the most compelling and damning classified evidence available substantiates this position. Fear that critical and key evidence needed for conviction will be excluded due to the inability of Article III Federal Courts or the Classified Information Protection Act (CIPA) to protect the sensitivity of the information will allow a hard-core terrorist operative to go free or receive a minimal sentence.

## **B. RESEARCH QUESTION**

Considering the modern day terrorism threat and circumstances posed to the national and homeland security of the United States, a question that must be asked is: Do Federal Article III courts meet the demands to effectively combat the modern day terrorism threat posed to U.S. national and homeland security? If the answer is no, then what steps should be taken to facilitate the use, or mitigate the exclusion of, classified intelligence information that is used to identify, locate and capture terrorist subjects, as evidence in their legal prosecution?

This thesis, using the applied methodology, will seek to answer the first question while identifying the steps that should be strongly considered to bridge any deficiencies in the current system. The intent of this project is initiate a fuller and more intense look by the professional and academic national security communities by providing analysis and recommendations that will compel a more robust discussion, body of literature and solutions that fuses the essential elements of disruption, intelligence collection and prosecution. The fundamental goal is to compel an instituted strategic and coordinated end game for terrorist subjects through the inclusion of classified evidence.

## **C. KEY ASSUMPTIONS**

“The War on Terrorism” did not begin on September 11, 2001. That date simply marked America’s acknowledgement that it was indeed embroiled in a brutal conflict that stretched well beyond the bounds of criminal acts and threatened the national and homeland security of the nation. Encouraged by the fall of the Soviet empire following its withdrawal from Afghanistan and by weak uncoordinated U.S. responses to the 1993

events in Somalia, the 1993 Trade Center bombing, the 1996 Khobar Towers attack, the 1998 Africa Embassy bombings and the 2000 attack on the USS Cole, Al Qaeda set its sights on delivering a perceived devastating blow in September 2001. Until that point, the U.S. chose to address the issue of terrorism as simply a law enforcement dilemma. Though there were some pre-9/11 successes achieved in the apprehension and conviction of terrorist subjects, it was not until the full force of American power was brought to bear on the Al Qaeda threat that significant degradation of group yielded a cessation of attacks.

If the U.S. is to maintain its current advantage in this conflict, the following key assumptions are necessary in addressing the issues presented in this thesis:

1. The U.S. priority in confronting the terrorism conundrum will be to prevent attacks against the homeland, allies and overseas interests. This first assumption predisposes the critical necessity of aggressively obtaining vital intelligence information through the exploitation of classified intelligence collection techniques, close liaison with foreign intelligence partners and the interrogation of captured terrorist subjects.
2. Terrorist organizations such as Al Qaeda will continue to seek and utilize lawless ungoverned areas such as the Federally Administered Tribal Areas of Pakistan (FATA), East Africa/Somalia or Trans Sahara Africa to train, plan and execute attacks. This second assumption is essential to understanding that even with the most skilled and capable law enforcement investigators, the feasibility and reality of pursuing and arresting terrorist operatives in such anarchistic environments is decidedly remote. This premise will continue to necessitate, to varying degrees, the U.S. government's utilization of armed forces capabilities, and more specifically, clandestine military and para-military special operations.
3. As the battlefield and political landscapes continuously morph, the means by which the apprehension and disposition of terrorist operatives will also need to constantly be adjusted. This assumption underscores the credence that approaching terrorism from solely a military, intelligence or law enforcement angle will ultimately be ineffective and result in further deadly attacks. This underlies the necessity to seek a balance in the application of American power or utilize certain capabilities when situations dictate one method over another.
4. Finally, the U.S. will continuously seek to impose the greatest and most substantial punishment permitted by law regarding the ultimate disposition of captured terrorist subjects. This final assumption accentuates the need

to incapacitate terrorist individuals to the greatest degree possible while administering due justice on convictions achieved with the full scope of the information available that clearly demonstrates their deadly actions and intent.

As pointed out in his March 2009 Center for Homeland Defense and Security (CHDS) thesis, Federal Bureau of Investigation (FBI) Special Agent Eric Smith, surmised that the U.S. has continuously been forced to consider the employment of military, intelligence or law enforcement capabilities against terrorism targets. Smith recounts that in 1998, following the U.S. Embassy bombings in East Africa, the Clinton National Security Council debated whether Usama Bin Laden was a military target or a subject to the legal process. Furthermore, Smith cites Steve Coll's Ghost Wars regarding then Secretary of State Albright's answer as to what decision had been reached. Albright stated, "We decided it was both." Secretary of Defense Cohen remarked that being forced to choose whether Bin Laden was a military or law enforcement target was a "false choice" and that all instruments of national power must be brought to bear simultaneously (Smith, 2009). Tragically, for nearly 3,000 victims and their families some three years later, that conclusion was never fully implemented.

#### **D. LITERATURE REVIEW**

A review of the current relevant literature that discusses possible mitigating solutions to the identified NIP impediment is varied. In some areas, the discussion focuses on the use of "secret evidence," the applicability of the Classified Information Procedures Act (CIPA), and the debate for the need and constitutionality of preventative detention and Military Commissions as a judicial venue to try terrorist subjects. Other areas focused on examining the lessons learned and models of foreign nations in their dealing with the terrorism issue. Finally, a review of successful inter-agency models and concepts regarding the establishment of an inter-agency architecture that develops a coordinated strategy for pursuing terrorist subjects while taking steps to mitigate the loss of classified intelligence as evidence.

## **1. Preventative Detention, CIPA and Military Commissions**

The issue of preventative detention is interwoven with the issues of intelligence collection, classified evidence, military commissions, and the conflicts with civil due process. The literature appears to confirm the widely accepted predicament of balancing the government's need to protect the sources, methods, and techniques utilized to collect sensitive classified information in order to prevent terrorist attacks, versus, adhering to transparent constitutional principals and due process. The literature reviewed in this area indicates two apparent schools of thought or sub-literatures in this area.

The first sub-literature argues against the constitutionality of preventative detention and military commissions while supporting the use of CIPA as a means to introduce classified information into the federal judicial process. A 2005 article in the *Harvard Law Review* provides an excellent summary of this literature and supports the views of Schulhofer and Turner (2005), Fitzpatrick (2002) and Robertson (2005). The review cites federal judge James Robertson's partial granting of a habeas corpus petition to Salim Ahmed Hamdan (Higham, 2004) and challenging the lawfulness of his trial by military commission. Judge Robertson's statement regarding the significant deviation from the confrontation clause in the Sixth Amendment that "it would not pass muster in any U.S. federal court" resulted in an immediate halt to the commission process at the time (Harvard Law Review, 2005). The *Harvard Law Review* continues by arguing the use of CIPA and Military rule of Evidence (MRE) 505<sup>4</sup> have been used for criminal prosecutions as means to protect classified information whereby the government can substitute summaries of classified documents for the documents themselves. This follows the presentation of the classified information to the judge *in camera* to determine if the classified information itself is: 1) Relevant to the case; 2) Whether it would be helpful to the defense. The result is neither the defendant nor his uncleared counsel ever see the actual classified documents permitting a criminal prosecution to go forward (Uniform Code of Military Justice [UCMJ] 505). They further argue the federal courts already

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<sup>4</sup> Military Rule of Evidence 505 largely mirrors CIPA and similarly permits the government to use substitution procedures in court-martial proceedings (UCMJ, A22-40, Rule 505).

possess the tools needed for protecting classified evidence while supporting the adversarial system, with the capability to evolve and adapt procedures to meet new quandaries as they arise.

The second sub-literature espousing a counter viewpoint is similarly recent and robust but paints a different picture; it argues for congressional legislative action to regularize a process for a new legal architecture for preventative detention. There are well-supported arguments for the creation of Federal Terrorism Court that would be designed to handle the complex nature of preventative detention, classified evidence, and transparent due process. This sub-literature also contends that CIPA in its current form is not intended and ill suited for use in terrorism trials. A segment of the work in this area strongly supports the constitutionality of military commissions and the designation of terrorist subjects as unlawful enemy combatants.

In a January 2007 article for the *Harvard Journal of Law*, Department of Justice (DOJ) civil rights attorney James Boeving asserts the court's attempt to rely upon the provisions of CIPA to protect classified information is not consistent with the legislative history of the Act, nor does it provide adequate protection of U.S. national security interests in terrorism trials. Boeving contends that CIPA would need to be amended to better suit terrorism judicial procedure in preventing the disclosure of sensitive classified information. Similarly, the Heritage Foundation's James Carafano and Paul Rosenzweig in a 2004 Legal Memorandum briefly discuss CIPA's fallibility in protecting highly sensitive information provided by foreign governments (Carafano & Rosenzweig, 2004).

Unlike the first set of sub-literature, Carafano, Rosenzweig and Department of Homeland Security (DHS) attorney Stephanie Blum delve into the issue of preventative detention as a way of addressing the need for intelligence collection via interrogation and incapacitation (Carafano & Rosenzweig, 2004; Carafano, 2006; Blum, 2008). In each of their publications, Carafano, Rosenzweig and Blum clearly express the need for legislative action to establish a settled structured legal process for preventative detention. A comprehensive, integrated legal structure will be needed in the future, and, in their view, the exercise of those powers is better constrained, and civil liberties better protected, if the exercise is regularized (Carafano & Rosenzweig, 2004).

The final aspect of this examined sub-literature directly confronts the critics regarding the constitutionality of establishing and utilizing military commissions or the designation of terrorist subjects as unlawful enemy combatants. These distinctions are crucial. They dictate the rights, rules and processes to which those captured and detained will be subjected. Christopher Evans, in an April 2002 article for the *Duke Law Journal*, asserts President Bush's November 2001 Military Order to convene military commissions is constitutional under *Ex parte Quirin*.<sup>5</sup> The publications by former Bush Deputy Assistant Attorney General in the Office of Legal Counsel, Professor John Yoo, are of particular significance. In his book, *War by Other Means*, Yoo details the legal validation supporting enemy combatant designations and preventative detention policies (Blum, 2008).

## **2. Foreign Models in the War on Terrorism**

An examination of the literature in this area focused on comparisons with other Democracies, namely the U.K., Israel and France, who have historically dealt with the issue of terrorism. Authors such as Shapiro (2003), Schulhofer (2004) and Blum (2008) identify processes and procedures that, though controversial, have been effective and could potentially be adapted to a U.S. legal framework.

There is a portion of sub-literature that is particularly critical of the Bush administration's preventative detention policies and implementation of extrajudicial military commissions. In a 2004 article in the *Michigan Law Review*, Schulhofer accuses the Bush administration of considerably diluting normal judicial checks on matters pertaining to the detention of civilians. In an October 2008 article for the *Homeland Security Affairs Journal* and in Chapter V of her Naval Postgraduate School CHDS thesis, Stephanie Blum conducts an excellent account and analysis of the preventative detention regimes of Britain and Israel. Blum lays out the significant differences between the preventive detention regimes of Israel and Britain compared to the U.S. enemy combatant policy.

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<sup>5</sup> *Ex Parte Quirin*, 317 U.S. 1, 48 (1942) (upholding President Roosevelt's power to establish military commissions for violations of the law of war by enemy saboteurs during World War II).

A collateral sub-literature focuses more on the development of a full legal architecture to deal with the terrorism issue. Shapiro and Suzan in their 2003 article for the International Institute for Strategic Studies take a step-by-step account of the French experience and evolution from the 1970s sanctuary doctrine to the development of a stout national terrorism court (Shapiro & Suzan, 2003). Carafano also discusses the British history of terrorism and current legal model, while Ludo Block of the Jamestown Foundation presents excellent insights into the French counter-terrorism pre-emptive judicial approach utilizing specially created privileged relationships between intelligence services and dedicated terrorism magistrates (Block, 2005).

### **3. Interagency Integration, Models and Concepts**

In this section, a review of literature pertaining to interagency models and integration varied. There was little in the way of examples for specific models that dealt with Department of Defense (DoD) and DOJ/FBI integration. Some documents could be found that discussed the larger U.S. government interagency structure while a number of documents discussed reorganization of the interagency security framework but on a macro level. The literature available for review was limited to some policy papers, some scholarly journal articles and congressional testimony relating to the 9/11 Commission.

A 2008 National Defense University paper by Alan Whitaker, Fredrick Smith and Elizabeth McKune describes the current organizational structure of the National Security Council (NSC), while defining the roles of the key departments and agencies. The paper also outlines and provides comments on how new homeland defense and security organizational structures are being implemented into the interagency process (Whittaker, Smith & McKune, 2008). This paper provides insight into where a potential interagency unit or strategy team, as previously mentioned, could reside.

In searching for literature that could provide insight into a successful structure or architecture, a 2006 article in *Joint Forces Quarterly* by Richard Yeatman, was one of few documents that discuss current integrated, yet proven interagency achievement. Yeatman points to the highly successful Joint Interagency Task Force-SOUTH (JIATF-S), as a model with a 17-year history of effective integration, cooperation and fantastic

execution. Though the JIATF-S model is a military establishment, this mock-up can easily be established with civilian law enforcement agencies in the lead and DoD components in supporting roles. P. H. Liotta of the U.S. Naval War College supports the position of a DOJ/FBI led “terrorist strategy task force” in his 2002 article for *Security Dialogue*. Liotta emphasizes the increasing need for inter-agency cooperation and that military capability will often provide supporting roles to a variety of national vulnerabilities, but primarily in the arena of homeland security (2002).

## **II. THE MILITARY/INTELLIGENCE SCHEMA AND MILITARY COMMISSIONS VS. ARTICLE III COURTS**

This chapter seeks to set the stage for the debate concerning areas that directly affect the use of information obtained outside of traditional law enforcement, and that provide admissible evidence: the collection and handling of evidence, as it relates to the Federal Rules of Evidence; the manner in which terrorism subjects are arrested, subsequently detained and the information obtained from their interrogations, as it relates to due process; and the legal environments capable of utilizing and protecting sensitive or classified evidence, which can also provide a fair and transparent trial. The evaluation of these areas is done with the understanding that the terrorism quandary and the threat it poses is no longer strictly a law enforcement affair. The problem requires the application of multiple elements of national power and the blending of inherent capabilities from many national assets. The chapter will demonstrate the differences that exist between traditional Article III and Military Commission forms of jurisprudence and the problems surrounding the use of classified evidence in those forums. It also justifies a review of tools implemented by other democratic nations that can meet the homeland security requirements of the nation while providing a fair judicial process to meet an “endgame.”

### **A. PROSECUTION AND THE NEED FOR EVIDENCE**

In a November 2001 Special Report for the U.S. Institute for Peace, author Dave Scheffer comments on the growing worldwide number of terrorist suspects. Scheffer remarks that Usama bin Laden is one of 22 suspects, publicly listed as the “FBI’s Most Wanted Terrorists,” who were already indicted by U.S. federal courts prior to the 9/11 attacks (2001). The shift to an offensive military and intelligence strategy along with the “prevention first” mantra has been a principal reason for the growing list of terrorist suspects ending up in custody. The most dangerous operatives and senior planners receive the label of High Value Detainee (HVD) (Office of the Director of National Intelligence [ODNI], 2007). As the debate on where and how terrorist subjects are tried

goes on, one fact remains clear: in order to try any detainee, regardless of the legal forum, the need for evidence is crucial to achieve a desired “endgame” conviction.

In its broadest sense, evidence includes everything used to determine or demonstrate the validity of an allegation and is the means by which one fulfills the burden of proof. Evidence is typically characterized in two forms: circumstantial evidence, or evidence that suggests truth and direct evidence, which directly proves truth. According to descriptions provided in the Federal Rules of Evidence, evidence can be in a tangible form such as documents, hardware and material items or in ethereal forms such as oral testimony and scientific test results. In the arena of U.S. criminal law, evidence is governed by the Federal Rules of Evidence and can come in both a classified and unclassified manner. The requirement to present enough suitable direct and circumstantial evidence to meet the burden of proof against terrorist subjects within an approved legal framework is at the heart of this debate. When a significant amount of the best evidence originates as classified intelligence information, and is precluded from use in Article III federal criminal courts due to current judicial procedure and rules of evidence, the U.S. runs a dire risk of not meeting the end game objective (Rosenzweig & Carafano, 2004).

## **B. COLLECTION AND THE HANDLING OF INTELLIGENCE INFORMATION AS POTENTIAL EVIDENCE**

Many observers reason that the Federal Rules of Evidence applied in criminal cases would make it difficult or impossible for the government to present bona fide evidence in terrorism trials. While others find these issues overstated, the authentication of physical evidence, referred to as “chain of custody,” and the unavailability of witnesses who may not be in a position to testify, are indeed legitimate concerns that can determine the success of achieving an end game prosecution (Zabel & Benjamin, 2008).

The aftermath of 9/11 and U.S. effort to combat the modern day terrorist threat have presented new dynamics that have forced the government to adapt to a shifting and complex homeland security challenge. Throughout the 1980s and 1990s, up to and including the 2000 bombing of the USS Cole, the response to terrorism was largely a

traditional reactive law enforcement effort. The collection of evidence by sworn federal agents during a post blast investigation followed the traditional lines of criminal procedure and rules of evidence. Strict handling and thorough documentation of where evidence was recovered, who “seized” the evidence, along with a verifiable chain-of-custody, are the expected standards of evidence handling in Article III courts. A permissive secure environment affords the benefit of time and allows federal agents to “process” a crime scene in a manner that permits the attention to detail that has come to be expected.

However, one of the new dynamics is that most of the senior level Al Qaeda leaders, planners and operatives are situated overseas in lawless ungoverned areas such as the Federally Administered Tribal Areas of Pakistan (FATA) or East Africa in Somalia—out of reach of law enforcement capabilities. The introduction of military and intelligence forces to disrupt and capture high value Al Qaeda leaders has proven effective, as evidenced by the capture of Khalid Sheikh Mohammad, Abu Faraj Al-Libi and Riduan bin Isomuddin Hambali (DefenceLink, 2009).

Military and intelligence operatives historically have been well versed and capable in the collection of intelligence data but do not possess the inherent skills on collecting and handling intelligence data in an evidentiary manner. Rand Corporation author and former CIA analyst Bruce Berkowitz (2003) explains that while the collection of evidence for law enforcement purposes and intelligence collection may resemble each other, they can differ substantially. Evidence collection traditionally aims to meet a specific legal standard such as “probable cause” or “beyond a reasonable doubt,” with the supposition of seeking a conviction in a court of law. Conversely, intelligence rarely tries to prove anything. Its main purpose is to inform officials and military commanders in order to facilitate the decision making process (Berkowitz, 2003). Berkowitz also confirms that “the clock runs differently” for law enforcement investigators as opposed to intelligence analysts. Intelligence analysts go to work before a crisis, operating against the clock, while investigators usually go to work after a crime and can be more methodical and detailed in their approach (Berkowitz, 2003). Figure 1 provides a visual

depiction of how intelligence and evidence, though traditionally divergent, do have a common point of intersection near the median where both are valued for their utility.

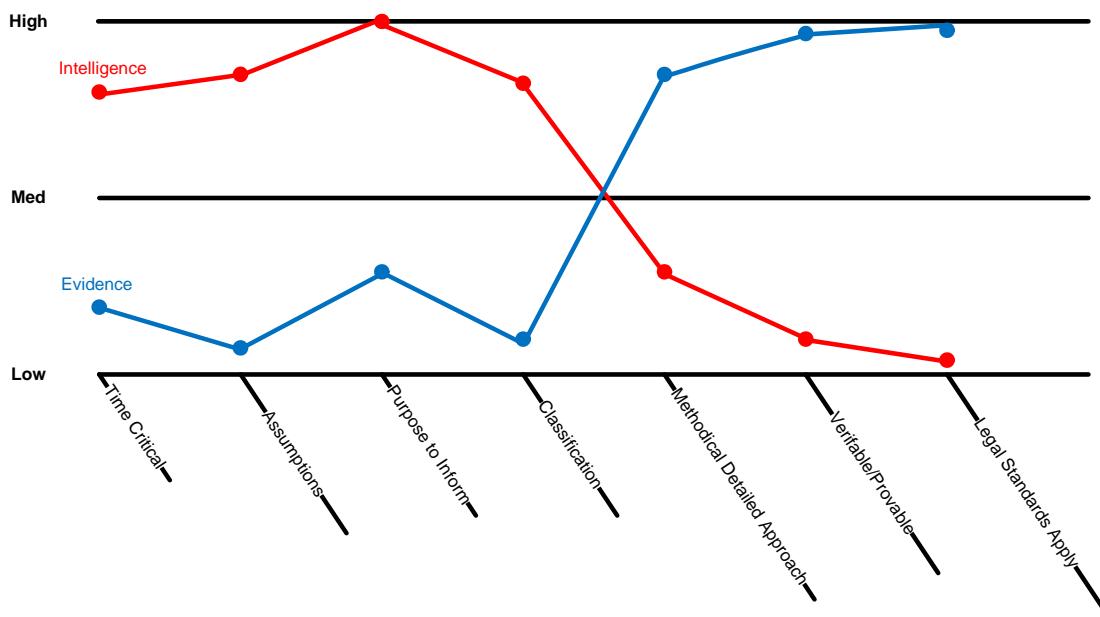


Figure 1. Intelligence/Evidence Value Innovation Chart

In the execution of the counterterrorism mission, this new dynamic has placed a separate onus on military and intelligence personnel to function in a manner in which they are not inherently designed or trained. Since the invasion of Afghanistan, military forces, particularly special operations units, have made significant improvement in their ability to conduct what is termed as “sensitive site exploitation” or SSE (Howard, 2009). SSE is defined as a series of activities inside a sensitive site captured from an adversary, the activities exploit personnel, documents, electronic data, and material captured at the site, while neutralizing any threat posed by the site or its contents (Galve, 2009). SSE can best be described as the military/intelligence equivalent of a law enforcement search warrant precipitated by the arrest or attempted arrest of a subject. U.S. Navy Captain Wyman Howard,<sup>6</sup> a veteran of hundreds of counterterrorism special operations missions, expressed that the execution of SSE by special operations units, while it has evolved significantly, it needs to be further enhanced and standardized (2009). Howard expressed

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<sup>6</sup> The views expressed by CAPT Howard are his own and do not represent the Office of the Secretary of Defence nor Special Operations Command.

the need to resolve how to transition the targeting of High Value Detainees to the Article III process. How can the U.S. counterterrorism community transition the intelligence material captured during an SSE to useful evidence for prosecutive end game (Howard, 2009)? While the improvement of specialized DoD units in this field is commendable, it does not mitigate other considerations, such as testimony in a judicial forum. The collection and handling issue is multi-faceted and can be complex even in a traditional criminal, non-combat scenario.

An example of the issue at hand can be shown by the October 2001 arrest of former Guantanamo Bay detainee, Salim Ahmed Hamdan. Hamdan was convicted by Military Commission on June 8, 2008, of material support to commit terrorism by acting as the driver for Usama Bin Laden (Markon, 2008). Hamdan was returning from the Afghanistan/Pakistan border when he was stopped and apprehended by U.S. and Afghan Special Forces. Found in his possession was a box of documents, photographs and passports. The military personnel involved in his arrest, not understanding evidence recovery techniques, the rules of evidence or chain-of-custody did not collect the information in Hamden's possession in a manner that would provide accurate accountability. Nor did they establish who among the group initially seized the information or arrested Hamdan. The documents in Hamdan's possession were handled by a number of different individuals before being transported to the U.S. Embassy in Islamabad, Pakistan. Once at the U.S. Embassy, the documents were provided to the FBI Assistant Legal Attaché, who boxed them up and sent them to FBI headquarters in Washington DC (Al-Bahlul, 2008).

Since the commencement of military operations in 2001, the training, tactics and operating procedures for SSE have significantly improved within the special operations community. As described by Howard (2009), “it is now executed in a very deliberate and precise manner.” Special Operations’ execution of SSE has risen to an exceptional level and is accomplished in an intrinsic manner that fills the requirement for intelligence collection. However, it is not a traditionally inherent special operations skill set as it relates to evidence collection and handling (Howard, 2009).

Among the documents confiscated from Hamdan was a small black notebook that contained a treasure trove of intelligence information on a number of Al Qaeda operatives to include Al Qaeda chem/bio scientist Yazid Sufaat (Charles, 2008; GlobalSecurity.org, 2009). When the notebook was sent for fingerprint analysis by the FBI, it returned with a positive match for convicted Guantanamo detainee Ali Hamza Al-Bahlul (Al Bahlul, 2008). These items were key pieces of evidence in securing the convictions of Hamdan and Al Bahlul in their 2008 Military Commission trials. These items will be just as critical in the anticipated Military Commission trials of other Al Qaeda detainees. However, this evidence was nearly thrown out by the Military Commission judge due to the lack of certainty of who originally arrested Hamdan and seized these crucial documents. Had the trial been in Federal Article III Court, it is very unlikely these documents would have survived based on the lack of authentication and a certifiable chain-of-custody. Sufaat, who was arrested by Malay authorities on December 12, 2001, and held for seven years under their Internal Security Act, was released from prison on December 12, 2008. Should the U.S. be compelled to prosecute Sufaat for his involvement in providing material support to Al Qaeda, the damning evidence contained in the notebook may be suppressed for another reason. While it is possible in legal proceedings for military personnel and intelligence officers' identities to remain protected, it is not always guaranteed. As stated by Howard, "there are genuine concerns with having operators testify, it may be possible in select cases but we should consider other options to achieve the desired outcome" (2009). It is also not uncommon for intelligence and even law enforcement officers from key nations to be forbidden to testify for fear of political backlash for cooperation with the U.S.

On January 22, 2009, President Barrack Obama signed an executive order to close down the Guantanamo Bay detention facility in one year's time while also declaring a suspension of the Military Commission trials (Henry & Starr, 2009). In September 2009, the administration requested its third continuance of Commission trials while seeking the potential to bring a good number of the 226 terrorist subjects to the U.S. to be tried in

U.S. (Finn, 2009). Regardless of the judicial venue to be utilized in seeking convictions of these subjects, the evidence needed to achieve convictions must be available and admissible to meet the “endgame.”

### C. CAPTURE, DETENTION, HABEAS CORPUS, AND INTERROGATION

In his 2006 book, *War by Other Means*, former Bush Deputy Assistant Attorney General and Berkley Law Professor, John Yoo, articulates the unique and unprecedeted nature of the Al Qaeda enemy. Yoo exclaims, “Al Qaeda is a covert network with no territory to defend, no civil population to protect and no standing military to attack. Al Qaeda launches surprise attacks on purely civilian targets” (2006). Emphasizing the imperative to prevent future 9/11 type attacks, Yoo states that the only way to achieve this objective is by acquiring intelligence. He further asserts the best intelligence is obtained from the interrogation of captured Al Qaeda leaders and operatives (Yoo, 2006).

Underscoring Yoo’s assertion is the March 2002 capture of senior Al Qaeda operative Abu Zubaydah. Zubaydah, one of the planners of the failed 2000 millennium attacks (Department of Defense [DoD], 2007), possessed vital knowledge of the identities of hundreds of Al Qaeda terrorists and the networks in which they operated (Yoo, 2006). The information gleaned from Zubaydah’s capture and interrogation led to the capture of 9/11 co-conspirator Ramzi Bin Al-Shib that followed six months later with the major coup in the capture of the 9/11 mastermind, Khalid Sheikh Mohammad (KSM) (Yoo, 2006). The capture, interrogation and intelligence from these key players, particularly from Mohammad, not only eliminated significant parts of the Al Qaeda hierarchy but also directly disrupted planned attacks against U.S. based targets and foreign allies (McNeill & Carafano, 2009; Yoo, 2006).

The capture, detention and interrogation of Zubaydah, Bin Al-Shib and KSM were outside the parameters of the traditional law enforcement format. All three were captured overseas with the assistance of a foreign intelligence agency and the reported involvement of specialized U.S. units (Shane, 2008). As HVDs, they were detained without appearing before a magistrate, charged with a criminal offense, and questioned without the legal representation. Each was considered an enemy combatant who had

violated the laws of war and as such, they were not entitled to the protections afforded by the Third Geneva Convention. It is reasonable to believe that had each been subject to traditional legal due process, the intelligence obtained from them to meet the first objective, the prevention of terrorist attacks, would have been significantly degraded or all together unlikely. In an article for the *New York Times*, author Scott Shane informs that KSM, following his March 2003 capture in Rawalpindi, Pakistan, told his interrogators he would only consider cooperating once he was flown to New York and provided a lawyer. KSM was savvy to U.S. jurisprudence having learned from the arrest and extradition of his nephew, Ramzi Yousef, the architect of the 1993 World Trade Center Bombing (Shane, 2008).

The Fourth Amendment is intended to protect against “arbitrary arrests and unreasonable searches” absent a warrant or probable cause.<sup>7</sup> A subject detained without a warrant is entitled to a *prompt*, non-adversarial hearing before a magistrate to provide a fair and reliable determination of probable cause in order to keep the detained subject in custody (FindLaw, 2009). The Supreme Court has interpreted a “prompt” hearing as being within 48 hours in order to make the determination of probable cause (Gernstein v. Pugh, 1975; County of Riverside v. McLaughlin, 1991). The Fifth Amendment, commonly known as the due process amendment, states a subject shall not be made to be a witness against himself and may not be “deprived of life, liberty, or property without due process of law (FindLaw, 2009). The Supreme Court has interpreted that the right to due process has “substantive” and “procedural” aspects. Substantive due process prevents the government from detaining a person prior to the judgment of guilt in a criminal trial. Government action depriving a person of life, liberty, or property endures substantive due process scrutiny; it must still be applied in a fair manner, referred to as “procedural” due process (U.S. v Salerno, 1987). These amendments support the writ of habeas corpus. A writ of habeas corpus is a judicial mandate requiring that a prisoner be brought before the court to determine whether the government has the right to continue

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<sup>7</sup> Probable cause is a reasonable belief that a person has committed a crime. The test the court employs to determine whether probable cause existed for purposes of arrest is whether facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime. U.S. v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992).

their detention. The individual being held or their representative can petition the court for such a writ. The Fifth Amendment also affords protection against self incrimination whereby in *Miranda v Arizona*, the Supreme Court's interpretation resulted in what is famously known as the Miranda warning. The Supreme Court summarized:

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. (*Miranda v. Arizona*, 1966)

The court proceeded to define custodial interrogation as, “questioning initiated by law enforcement officers after a subject has been deprived of his freedom of action in any significant way” (*Miranda v Arizona*, 1966). The court further stated that the procedural safeguard of warning the subject of his right to remain silent and to the presence of an attorney must be conducted prior to any questioning or the government risks summary dismissal of the case (*Miranda v Arizona*, 1966). Additionally:

if the individual is alone and indicates in any manner that he does not wish to be interrogated, he may not be questioned. Despite the fact the subject may have answered some questions or volunteered some statements does not deprive him of the right of refrain from answering further questions until he has consulted with an attorney and thereafter consents to be questioned. (*Miranda v Arizona*, 1966)

From his statement to interrogators, KSM assumed he was entitled to these same legal substantive and procedural safeguards (Shane, 2008). The debate between civil libertarians and the national security community centers on how much, if any, those like KSM should be afforded the rights and protections typical in criminal due process. Many civil libertarians have argued as much. Some, such as Richard Zabel and James Benjamin of Human Rights First, contend that the applicability of *Miranda* is null if the subject is detained and questioned overseas by foreign officials and the statements are given voluntarily. However, in the 1998 Embassy Bombings case, the presiding judge broke new ground by declaring that when, “U.S. law enforcement questions a detained suspect overseas, the U.S. officers must administer a variant of the *Miranda* warnings even though the questioning is occurring outside the United States” (Zabel & Benjamin, 2008). This was in reference to one of the bombers, Daoud Al-'Owhali, who bailed from

the explosive laden truck in the final minute. Following his arrest, Al-'Owhali was interrogated by FBI agents while in the custody of Kenyan authorities. Statements by Al-'Owalhi in Kenya prior to his being fully apprised regarding his right to have a lawyer present during questioning were suppressed, but statements he made following the application of modified Miranda were ruled admissible (Zabel & Benjamin, 2008). Zabel and Benjamin do admit that there are few who have been on trial following being captured on the battlefield and there is no means to substantiate how the courts would perceive Miranda under those conditions. This notwithstanding what now defines the battlefield which many now contend extends beyond the traditional parameters of a “front line” and lawful uniformed military combatants.

The capture, detention and interrogation of terrorism subjects are a critical piece to the admissibility of critical evidence. KSM demonstrated his intent to shield himself from interrogation and perhaps even challenge the legality of his arrest by demanding to be taken to the U.S. and provided legal representation. If the U.S. government submitted to this maneuver it would be highly disruptive to the intelligence collection process and seriously degrade meeting the objective of prevention. KSM was not provided a Miranda warning nor was his detention evaluated before a magistrate within 48 hours to determine probable cause for his arrest. He was not permitted to petition a writ of habeas corpus. KSM was questioned at length and under what many consider harsh and coercive methods.<sup>8</sup> While the arrest and interrogation of KSM, and the other HVDs, meets the first objective of prevention, this only addresses one part of the problem. Preventing HVDs from rejoining the fight and successful prosecution that results in the long-term elimination of the threat posed are the other two sides of the triad.

In this asymmetric, unconventional conflict, should the ability to effectively prosecute a terror subject be acutely jeopardized when the manner of arrest, prolonged detention, and information obtained come from outside of traditional criminal due process yet meet laws of war legality? If defeating the modern day terrorism threat requires the blending of military, intelligence and law enforcement capabilities, shouldn't

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<sup>8</sup> Though the methods of enhanced interrogation have also become a serious cause for concern regarding evidence admissibility, this unique issue is outside the scope of this thesis.

the U.S. also seek to blend and construct a constitutionally acceptable legal means of arresting, detaining and interrogating terrorism subjects? Examining the issue of preventative detention as practiced in other Democracies such as the U.K. and Israel while exploring the French judicial construct for potential solutions will be addressed later in this thesis.

#### **D. CONSTITUTIONAL DEBATE OF THE MILITARY COMMISSION PROCESS**

The success of the post 9/11 military and intelligence scheme has clearly been demonstrated with the thwarting of over 23 plots (McNeill & Carafano, 2009). However, criticism regarding aspects pertaining to the capture, detention and interrogation of terrorist subjects persists as the pendulum now swings away from a military centric stratagem. On 18 September 2001, the Congress provided, “The Authorization for Use of Military Force (AUMF)” against those responsible for the attacks launched against the United States on 11 September 2001 (Pub L. 107-40, 2001). This action significantly changed the manner in which the U.S. would deal with terrorism. Consequently, the Bush administration declared the Global War on Terrorism (GWOT) and brought U.S. military might to bear on Al Qaeda and their Taliban hosts in Afghanistan.

As in all previous wars fought by the U.S., prisoners were taken and those believed to be associated specifically with Al Qaeda were considered the most valuable but also the most controversial. Should Al Qaeda prisoners be considered “prisoners of war” (POW) and afforded the rights and protections as outlined under the Third Geneva Convention? Or are Al Qaeda captives arrested criminals who are afforded the rights of due process and habeas corpus? Or do they legally fall into a third category as “enemy combatants?” As enemy combatants, they are not entitled to Geneva protections, traditional criminal due process. In addition, they can be subject to prolonged detention, interrogation and trial by military commission.

The first part of the debate concerns whether captured Al Qaeda members are prisoners of war or enemy combatants. In November 2001, President Bush issued The Military Order of November 13, 2001. This order declared:

To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunal. (Military Order, 2001)

President Bush, advised by the Department of Justice, Office of Legal Counsel, further declared in a February 7, 2002 White House memorandum:

*None of the provisions of Geneva apply to the conflict with Al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, 1) Al Qaeda is not a High Contracting Party to Geneva; 2) Common Article 3 of Geneva does not apply to either Al Qaeda or Taliban detainees, because the relevant conflicts are international in scope and common Article 3 applies only to “armed conflict not of an international character.” 3) Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva and because Geneva does not apply to the conflict with Al Qaeda, Al Qaeda detainees also do not qualify as prisoners of war [emphasis added].* (White House, 2002)

The administration further stipulated that even if Geneva applied, Al Qaeda was required to obey four principles in order to receive POW status; 1) Operate under a responsible command; 2) Wear uniforms; 3) Carry their weapons openly; 4) Obey the laws of war (Yoo, 2006). According to Yoo, since it is apparent Al Qaeda has never followed any of these tenets and seeks to deliberately break the laws of armed conflict, Al Qaeda further sacrificed any claim to POW status.

Obstinately, many, such as the late University of Washington Law professor Joan Fitzpatrick (2002), argued that the Bush administration’s decision to deny POW status to captured Al Qaeda was “contemptuous of international law.” Fitzpatrick claimed the denial of POW status violated Article 5 of the Third Geneva Convention, which requires a “competent tribunal” to determine whether any “persons, having committed a belligerent act and having fallen into the hands of the enemy,” qualify as prisoners of war. Fitzpatrick stated that members of militias and organized resistance movements can qualify as POWs under defined circumstances; hence, some Al Qaeda members captured during fighting in Afghanistan may also be entitled to presumptive POW status (2002).

At the heart of the debate is how POWs are handled as opposed to those designated as enemy combatants. Under Part 1, Article 3 and Part 3, Article 17 of the Third Geneva Convention, lawful combatants detained by the opposing force cannot be subject to interrogation (Geneva, 1949). As stated in Part 3, Article 17, “Every prisoner of war, when questioned, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information” (Geneva, 1949). Part I, Article 3 states, “The passing of sentences must also be pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples” (Geneva, 1949).

If Al Qaeda has forfeited any claim to POW status, as designated as enemy combatants, the government possesses increased flexibility in detention and interrogation to obtain actionable intelligence that could disrupt attacks and lead to the capture of other Al Qaeda operatives (Yoo, 2006). The enemy combatant designation also made captured Al Qaeda detainees subject to the military commissions established by President Bush in the November 13, 2001 Military Order. As described by Yoo, military commissions have a long and tested history having been utilized by Presidents and generals in virtually every American war. Military commissions are specialized military courts that supporters claim are able to balance providing a fair and transparent trial for enemies who commit violations of the laws of war while protecting the nation’s military and intelligence interests (Yoo, 2006).

Opponents of Military Commissions such as Harvard and Georgetown law professors Laurence Tribe and Neal Kaytal have litigated against commissions as being unconstitutional, absent a formal declaration of war and explicit congressional authorization via statute (Kaytal & Tribe, 2002). The claim to the differences in judicial procedure and evidentiary standards compared to Article III and Court Marital make commissions unconstitutional. These assertions were bolstered by the Supreme Court’s

2006 ruling in *Hamdan v. Rumsfeld*.<sup>9</sup> Other opponents, such as Fitzpatrick, the Century Foundation's Stephen Schulofer and University of Houston International Law Professor Jordan Paust, exclaim commissions violate international law as it relates to the Geneva Conventions. As stated by Paust:

When there is an international armed conflict, certain persons, such as enemy combatants who are members of the armed forces of a party to the conflict, are entitled to prisoner of war (POW) status and protections under Article 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW). Membership in the armed forces is the determining criterion, yet prisoners of war can simply be detained during an armed conflict. During an armed conflict, all persons who are not prisoners of war, including so-called unprivileged or unlawful combatants who may or may not have POW status, have at least some non-derogable rights to due process under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Civilian Convention or GC) and Geneva Protocol I. (2003)

However, proponents will argue military commissions have centuries of practice, are buoyed by the Constitution and supported by Supreme Court precedent. Commissions were first utilized by General Washington during the revolution and most extensively during the Civil War and World War II. From a Constitutional aspect, President Bush's authority to establish commissions was based on, "the commander-in-chief powers provided by the Constitution, including the power to wage wars that Congress has declared" (Evans, 2002). Proponents point to the September 2001 AUMF by Congress as the equivalent of a war declaration against a non-state organization such as Al Qaeda. Further supported by the congressionally approved Uniform Code of Military Justice (UCMJ), Article 21 asserts that military commissions have "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions... or other military tribunals" (10 U.S.C. 821, 2000). Thus as the commander-in-chief, the president can establish military commissions to try and punish those who have committed violations of the laws of war (Evans, 2002).

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<sup>9</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). On June 29, 2006, the Court issued a 5-3 decision holding that it had jurisdiction that the administration did not have authority to set up these particular military commissions without congressional authorization because they did not comply with the Uniform Code of Military Justice and the Geneva Convention which the court found to be incorporated into the Uniform Code of Military Justice.

During the Civil War and reconstruction period, commissions tried in excess of 2000 cases, most notably those associated with the assassination of President Lincoln (Yoo, 2006). The Supreme Court has heard some of the most significant challenges to commissions beginning with the civil war decision in *Ex Parte Vallandigham* where the Court held it did not have the jurisdiction to hear challenges to sentences imposed by military commission (*Ex Parte Vallandigham*, 1863). In *Ex Parte Milligan*, the Court held that military commissions could not try civilians in areas where civil courts were open and the accused did not associate with the enemy (*Ex Parte Milligan*, 1866). However, inherent in the decision is that if Milligan had not been considered a civilian but an unlawful combatant, he would be subject to the jurisdiction of military commissions for violations of the laws of war. This is supported by a federal court's decision in *Ex Parte Mudd* where the challenge for the use of commissions regarding those tried for the Lincoln assassination was rejected (*Ex Parte Mudd*, 1868).

The most significant Supreme Court ruling was the 1942 *Ex Parte Quirin*, which upheld President Roosevelt's authority to establish commissions during WWII. *Quirin* dealt with eight Nazi saboteurs who infiltrated the U.S. intent on committing hostile actions while disguised as civilians. The saboteurs were arrested by the FBI and, at the recommendation of Attorney General Francis Biddle, President Roosevelt convened special military commissions in July 1942. *Quirin* sought to challenge the constitutionality of the commissions when the federal courts were open and available (Evans, 2002). The Court held:

*The Constitution does not require that offenses against the law of war be tried before a jury. The detention and trial of petitioners ordered by the President in the declared exercise of his powers as Commander-in-Chief in time of war and of grave public danger are not to be set aside by the courts without the clear conviction that they are in violation of the Constitution or laws of the United States [emphasis added].* (*Ex Parte Quirin*, 1942)

While opponents will argue the military commissions established by President Bush are unconstitutional because they were not authorized by Congress, neither were those used by Roosevelt during WWII. Proponents state the Supreme Court relied on

Article 15 of Congress's 1916 overhaul of the Articles of War, which remains as part of the UCMJ (Yoo, 2006). In response to the Hamdan decision, Congress passed the Military Commissions Act of 2006 (MCA), which according to Yoo, "was a stinging rebuke to the Supreme Court in its attempt to take over terrorism policy" (2006). The MCA provided Congress's approval for the establishment of military commissions while stripping the courts of jurisdiction to hear any habeas corpus claim filed by any alien enemy combatant anywhere in the world (United States Military Commissions Act, 2006).

Establishing the affirmative Constitutional and legal standing of Military Commissions is critical when contemplating the manner in which terrorist subjects will be brought to justice. Article III courts impose a very high and rigid standard regarding the evidence that can be presented to a jury. The judicial procedures such as Miranda warnings and the use of search warrants to obtain evidence are meant to control police behavior and have less to do with the credibility of evidence. Equally relevant is a defendant's Sixth Amendment right to call witnesses in his defence and face the witnesses and evidence against him. These standards are high because the cost to society by allowing a criminal to go free due to police or prosecutor malfeasance is relatively low when compared to the rights prescribed in the Bill of Rights. However, in times of armed conflict it can be argued that these rules do not apply to the enemy since the primary purpose in war is to defeat the enemy. The rules of military commissions are less rigid than those of Article III courts, mainly due to the nature of combat operations, the means by which intelligence information is obtained and the manner in which enemies are captured. The inherent flexibility of commission rules permits for the use of hearsay testimony, evidence obtained without warrants and unmirandized statements by the accused. Furthermore, commission proceedings can be closed and the subject excluded to protect classified sources, methods and information.

In dealing with this modern asymmetrical threat in which technology has made it possible for previously isolated non-state actors to threaten the existence of society, the consideration of a modified judicial process fashioned within a constitutional framework must be considered. Many legal scholars such as Carafano (2006), Rishikof (2003, 2007)

and Rivkin (2007) have advocated for a new national security court, which they claim can better meet the demand of the current blended military, intelligence and law enforcement effort. Others have pointed to the fact that since military commissions can only be narrowly applied in times of declared conflict against specific actors, they limit the compromise between national security and civil liberties. As argued by Yoo, military commissions possess a civil libertarian function by insulating the flexible rules allowed in commissions from bleeding over into civilian courts and potentially threatening domestic criminal law during peacetime (2006). In the course of seeking an “endgame” solution for terrorist detainees, the venue and the applicable rules must meet both constitutional thresholds and national security requirements concerning the inclusion of all evidence to the greatest extent possible.

#### **E. THE CURRENT TOOLS FOR PROTECTING CLASSIFIED EVIDENCE: CIPA, MRE 505 AND MCA 2006**

The debate on Military Commissions versus Article III courts is the segue to an evaluation of how classified information is currently protected in Federal Court. As discussed by New York University (NYU) Law School professors Serrin Turner and Stephen Schulhofer, a principal concern with prosecuting accused terrorists in Article III courts is the court’s ability to adequately protect secret information vital to the counterterrorism effort. Conversely, the main objection to military commissions has been that secret and un-refuted evidence can play a major part in unfairly depriving a defendant of Sixth Amendment rights to confront the evidence against him, to obtain evidence in his favour, and be tried in a public proceeding (Turner & Schulhofer, 2005). Department of Justice senior litigation counsel, John De Pue (2009), has stated that constitutional mandates apply to all evidentiary material, meaning that the government is obligated to produce not just incriminating evidence but also evidence that can be considered exculpatory such as Brady or Jenks material. The problem typically is not the material itself, but the means by which it is acquired, and if the disclosure of that material would expose and compromise highly sensitive sources, techniques or on-going operations (De Pue, 2009).

The Classified Information Protection Act (CIPA), and its military equivalent, Military Rules of Evidence 505 (MRE 505), were both enacted by Congress in 1980. CIPA affords the government in Article III courts the ability to substitute a summary of classified documents in lieu of the documents themselves, or submit a statement declaring facts that the documents would be apt to prove. The intent is to permit a criminal prosecution to proceed without the defendant or his counsel ever seeing the actual classified documents. MRE 505 largely mirrors CIPA and similarly permits the government to use substitution procedures in court-martial proceedings (Harvard Law, 2005).

Proponents contend the government possesses a number of options for dealing with classified evidence that is potentially relevant to the prosecution of a terrorism suspect. Two are defined as “filtering” and “restricted disclosure.” Utilizing the mechanisms in CIPA, “filtering” attempts to edit out classified information in order to regulate any disclosure in a criminal case. CIPA filtering attempts to mitigate, though they do not eliminate, the risk of the government having to either disclose the classified material or dismiss the most serious charges, if not the entire case (Turner & Schulhofer, 2005). Restricted disclosure involves the federal court’s ability to limit disclosure of classified information only to specified persons such as cleared counsel during discovery. Furthermore, the court can restrict public access to proceedings when classified evidence will be presented. However, even Turner and Schulhofer concede that these procedural tools are underdeveloped and not formalized in statute (2005).

As stated by De Pue (2009) and supported by Schulhofer (2005), the greatest test and burden concerning classified information is not necessarily the evidence presented at trial but the discovery obligation encumbered by the prosecution. When considering a discovery request by the defense, the courts employ a two-part test to determine if the classified information itself is: 1) Relevant to the case, 2) Whether it would be helpful to the defense. If the classified information meets these criteria and is deemed discoverable, the burden shifts to the government to show why modification or substitution of the documents is necessary. If the government’s substitution is not deemed sufficient to

adequately meet its discovery obligation, the government must either release the information in its original form or face penalty that may include dismissal of specific charges or the entire prosecution (Harvard Law, 2005).

Proponents of CIPA stand by the premise that the military commission process, created specifically to protect classified evidence, should be abandoned due to the commission rules lacking appropriate safeguards to ensure transparency and protect from open-ended government discretion in keeping secret evidence from a defendant (Turner & Schulhofer, 2005). They further argue the federal courts already possess, in CIPA, the tools needed for protecting classified evidence while supporting the adversarial system (2005). Schulhofer attempts to bolster this point by stating CIPA has demonstrated its capability in protecting classified information during the successful terrorism convictions of Ramzi Yousef for the first World Trade Center bombing, Ahmed Rassem, the millennium bomber, Richard Reid the Shoe Bomber and Zacarias Moussaoui for the 9/11 conspiracy (2008).

While the application of CIPA in terrorism trials has shown to be somewhat effective, critics and supporters alike acknowledge that it has its limitations. CIPA, as argued by *Harvard Law*'s James Boeving (2007), was designed to address the problem of prosecuting Cold War spies for espionage. Typically, an espionage defendant, a U.S. government employee or contractor, would attempt to “graymail” the government into abandoning the charges by threatening to reveal classified information the defendant had access to in connection with his job or necessary for his defense (Boeving, 2007). Critics argue the legal aspects of the war on terrorism present significant differences and concerns regarding the disclosure of classified information for which CIPA was not designed. Critics state that CIPA's legislative intent is inconsistent in regards to terrorism and makes its application, in a broader spectrum of terrorism trials, inadequate to protecting U.S. national security interests (Boeving, 2007). Furthermore, no established body of law currently details the means by which CIPA should be applied to terrorism trials.

As an example, in the terrorism trial of Moussaoui, federal judge Leonie Brinkema ruled that the discovery provision of CIPA only applied to the documentary

classified evidence and could not apply to prospective deposed testimony of HVDs not yet reviewed by the court (U.S. v Moussaoui, 2003). The consequence was the government having to drop the conspiracy charges relating to 9/11 and abandonment of the death penalty. A subjective look at many of the terrorism cases, which proponents sight as CIPA success, such as Reid, Moussaoui and Lindh resulted in the subjects pleading guilty without CIPA being fully tested. While there have been a number of cases where the government has been able to declassify information, critics have argued the crux of the problem is not what the government can declassify but what it cannot and CIPA's inability to protect the core sources and methods used to acquire that information.

Modelled after CIPA, MRE 505 provides the government with a similar privilege against disclosure of classified information by allowing for the substitution to protect classified information in military court-martial proceedings (Harvard Law, 2005). In response to the Supreme Court's ruling in *Hamdan v Rumsfeld*, Congress passed the Military Commissions Act of 2006. In the MCA, Congress rejected the limited exclusion of the defendant from portions of the proceedings. The MCA requires that "the accused shall be present at all sessions of the military commission" and allows exclusion only under narrow confines of disruptive behavior. Rather than permit the exclusion of the accused from proceedings, the MCA seeks to protect classified evidence by incorporating procedures modeled after those in MRE 505 (Boeing, 2007).

However, perhaps recognizing limitations in MRE and the stipulation in the Military Order of 13 November 2001, that only non-U.S. citizens could be tried by Military Commission, the MCA unlike MRE, contain detailed provisions that seek to protect classified information. The MCA contains specific provisions that allow for the protection of sources and methods. This provision allows trial counsel, upon making an appropriate request, to present evidence to the commission without revealing the sources, methods, and activities of the United States. The MRE contains no similar provision, underscoring the key difference in prosecuting U.S. military personnel in courts-martial and prosecuting terrorists in military commissions (Boeing, 2007). Furthermore, the MCA has no provision granting the military judge the authority to compel disclosure of classified information. A considerable contrast to both MRE 505 and CIPA, this

provision does not place the prosecutor in a predicament of being forced to disclose classified information or abandoning the case. Perhaps the most important difference is that the MCA permits an *in camera* and *ex parte* review of trial counsel's claim of privilege at any point of the proceeding and not just prior to the referral of the charges as in MRE. As opposed to MRE 505, which provides for an *in camera* hearing, but not one conducted *ex parte* or outside the presence of the defendant, the provision is designed to prevent exposure of classified evidence from both public view and the defendant (Boeing, 2007). Another significant advantage MCA provides is that the jury panel in commissions is cleared and able to review classified evidence or hear classified testimony. A jury in an Article III or even courts-martial, with CIPA or MRE 505 working in an ideal manner, cannot provide the equivalent level of safeguard regarding the disclosure of the sources and methods used to bring the classified evidence to trial.

Many on both sides of the debate feel that CIPA and MRE 505 are functional but require legislative improvements. Recommendations have been made to codify the use of CIPA in terrorism prosecutions, establish a standing pool of cleared defense counsel, and permit for the limited exclusion of the defendant at junctures where classified testimony must be entered.

## **F. SUMMARY**

The U.S. is confronted with a considerable irregular threat from an amorphous enemy who wages a vicious form of criminal armed conflict. The consequences of successful attacks in this paradigm have and will produce devastating affects on the social, economic and human fabric of the nation. These consequences and the nature of the enemy and the manner in which they operate dictate that prevention of attacks must be the priority. It also dictates that the U.S. must recognize the problem as not solely a military, intelligence or law enforcement problem, but a problem that lies within a seam requiring the application of all elements. Such is the case, while the U.S. possess distinct rules and tools for dealing with criminal matters versus military matters, this problem necessitates finding a convergence of aggressive, effective and lawful means to capture, exploit and prosecute terrorist subjects. The collection and use of intelligence

information meets the goal of preventing attacks. The means of turning that intelligence information into useful evidence to meet the “endgame” is the hurdle that must be cleared. The obstacles remain, and the following case studies will demonstrate the holes that exist in the Article III process, even in perceived successful convictions.

### **III. METHODOLOGY/CASE STUDIES**

Modern day conditions with the continuous advancement and access of technology has forced the U.S. to consider the demands the international threat environment places upon its national and homeland security. More important is how the U.S. will adapt to meet these threats, prevent attacks, and convict those who mean to do the nation harm. In 2008, at the direction of the Director of National Intelligence, the National Counterterrorism Center, Senior Inter-Agency Strategy Team proceeded to identify impediments to the National Implementation Plan for the War on Terrorism. One of those identified impediments is the facilitation of classified intelligence information as evidence in the prosecution of terrorism subjects (National Counterterrorism Center [NCTC], 2008). This issue is multi-faceted and involves the debate of the suitability of Federal Article III courts versus Military Commissions. It also involves the questioning the adequacy of the Classified Information Protection Act (CIPA), the need for a legal preventative detention regime of terrorism subjects to prevent attacks and allow for the use of their statements in court. Finally, it includes the use of highly specialized classified military and intelligence units that are involved in the capture of terrorism subjects and evidentiary material.

#### **A. THE SELECTION OF THE PADILLA, AL-BAHLUL AND REID CASES**

Considering the threat and circumstances posed to the national and homeland security of the United States, a question that must be asked is: Do the civilian Federal Article III courts meet the demands to effectively combat the modern day terrorism threat posed to U.S. national and homeland security? Since 9/11, 28 terrorist plots have reportedly been disrupted (McNeill & Zuckerman, 2009). Many of those involved, such as Najibullah Zazi, have yet to test their cases in court (Sheehan, 2009). With the U.S. government's recent controversial decision to try the cases of five Guantanamo Bay detainees associated with the attacks of 9/11 in New York, the civilian Article III system

will be severely tested (Weber, 2009). Some cases frequently cited as examples of success, such as Jose Padilla and Richard Reid, upon closer examination reveal flaws that can prove to be dangerous.

In this regard, a case study analysis of former designated “enemy combatant,” Jose Padilla, who was prosecuted and convicted in Article III court; Ali Hamza Ahmad Suleiman Al-Bahlul, who was tried and convicted in a Military Commission at the U.S. Naval facility in Guantanamo Bay, Cuba; and examination of the Richard Reid case, who plead guilty in Article III court, will show the differences between the venues and demonstrate problems that exist and require adaptations or steps to be considered. Elements from Omar Abdel Rahman case are also introduced to emphasize particular points in specific areas as outlined in the previous paragraph. The recent high profile case of Umar Farouk Abdul Mutallab, the Christmas Day underwear bomber, is also examined to highlight the similarities with the Reid case and the corrective actions directed by the President as a result. The variables that will be examined in these cases include 1) The charges brought against each subject; 2) The charges that were not brought due to issues dealing with classified information or the inability to produce witnesses at trial; 3) Amount of time each subject was held in a preventative detention situation and the results of intelligence obtained; 4) Length and severity of the sentences received.

## **B. CASE STUDIES**

### **1. Padilla Case**

#### *a. Key Takeaways*

1. Article III process was insufficient in meeting the threat posed by Padilla forcing the government to declare him an enemy combatant and abandoning charging him with more substantial terrorism offenses. The sentence imposed on Padilla did not meet his intended actions.
2. Lack of a legal preventative detention regime forced the U.S. to designate Padilla an enemy combatant when no other option was available. Statements made by Padilla while in a preventative

detention situation, which confirmed his intention to carry out terrorist attacks, were not admissible in Article III court.

3. The use of hearsay statements by other detainees in preventative detention concerning Padilla was not admissible in Article III court. Classified intelligence gained from interrogations of Padilla while in preventative detention as an enemy combatant identified other Al Qaeda operatives, training, tactics, and procedures.
4. The utility of CIPA, while functional, needs modification to protect classified information and obtain convictions.
5. The involvement of special operations military and intelligence units in the terrorism conflict is problematic in the Article III setting.

*b. The U.S. Citizen Dirty Bomber*

Consider the following scenario: Intelligence sources reveal a plot by a terrorist organization operating in Afghanistan/Pakistan region. The intelligence indicates that one of the terrorists is a U.S. citizen and is strongly linked to al-Qaeda. The target of the plot is undetermined but is definitely in the United States, possibly on the West Coast or in Texas. The plot is in motion, but it is unclear when it will happen, what form it will take, or whether the terrorists are in the United States or not. Additional intelligence later determines the U.S. citizen has made plans to re-enter the U.S. in furtherance of this plot (Newman, 2002). On 8 May 2002, Jose Padilla, a U.S. citizen, whom intelligence sources clearly indicated was a member of Al Qaeda involved in a plot against the U.S. homeland, was arrested when his plane landed at O'Hare International airport in Chicago (Mukasey 2007).

The clarity between national and homeland security versus criminal law enforcement can be murky at best. Foreign intelligence operations, military operations and coordination with foreign nations along with domestic and international law enforcement all play critical and complicating roles in situations such as these (Newman 2002). In a 2007 editorial in the *Wall Street Journal*, former Attorney General, Michael Mukasey, distressingly points out that despite the intelligence information that indicated Padilla was strongly linked to senior Al Qaeda leadership and involved in a plot to

commit violent terrorist acts in the U.S. homeland, the FBI was not able to arrest him on any kind of criminal warrant due to the classified nature of the information. Instead, the FBI had to utilize a century-old statute to secure a material witness warrant in order to detain Padilla and disrupt the operation.

With no other legal means available, the government relied heavily on the outdated Material Witness statute following 9/11 because it did not possess in its arsenal any legal way to authorize investigative or preventative detention based on reasonable suspicion, much like what is available in Britain, Israel and France (Mukasey, 2007). As Mukasey states, the material witness statute is inadequate for dealing with the serious perils of terrorism since it provides the government with insufficient time in which to have a subject, such as Padilla, be interrogated, testify before a grand jury and prosecuted or released. In Padilla's case, when that limited time ran out, the nature and substance of the information in the government's possession made charging him impossible and releasing him unacceptable. The government withdrew the grand jury subpoena that triggered his designation as a material witness and instead designated Padilla as an "unlawful enemy combatant" (Mukasey, 2007). Mukasey stipulates that the allegation Padilla was involved in a "Dirty Bomb Plot" and other assorted terrorist actions could not be proved without utilizing the "classified or hearsay evidence" needed to charge and prosecute him in an Article III court. This resulted in Padilla becoming one of the first U.S. citizens in more than a century to be designated an enemy combatant (Mukasey, 2007).

Following a litany of appeals by attorneys representing Padilla, including one before Mukasey himself in 2002, while serving as a federal district court judge in the Southern District of New York, the government rescinded the enemy combatant designation and transferred Padilla from the custody of the Secretary of Defense to the Attorney General. On 17 November 2005, Padilla was charged with; U.S.C. 18 § 956(a), Conspiracy to Murder, Kidnap, Maim Persons in a Foreign Country; U.S.C. 18 § 2339(a) Conspiracy to Provide Material Support to Terrorists and U.S.C. 18 § 2339(b) Material Support to Terrorists (U.S. vs. Padilla, 2005). Though conviction on these charges can

bring a maximum penalty of life in prison, there was heavy criticism of the government that none of the charges brought against Padilla involved conspiracy to commit terrorism in the U.S. homeland.

In a 2007 article in the University of Virginia Law School Alumni Magazine (*UVA Lawyer*), FBI Special Agent John Kavanaugh suggests that the government in many ways got lucky in that the FBI had an on-going investigation on Ahmad Hassoun, a radical Islamic cleric in South Florida, who had been recruiting and fundraising for terrorist groups in Afghanistan and Pakistan beginning in the 1990s. One of Hassoun's recruits was Padilla (Couch, 2007). In a follow on interview, Special Agent Kavanaugh, an attorney prior to entering the FBI, clarifies that the government's conspiracy prosecution of Hassoun fortunately provided an option to charge Padilla because he fit into the conspiracy. However absent this option, the disposition of Padilla was still undetermined.

Kavanaugh (2009) indicated the government's case against Padilla did not include any aspects of the "dirty bomb" or natural gas explosion plots due to the majority of the evidence coming from the interrogations of senior Al Qaeda and 9/11 planners Abu Zubaydah and Khalid Sheik Mohammed. The nature of the preventative detention and interrogation of Zubaydah, KSM and Padilla himself rendered this critical information inadmissible in Article III criminal courts (Kavanaugh, 2009). Kavanaugh provided that the bulk of the evidence that would have been necessary to build substantial charges to commit terrorist attacks was not available due to the level of classification, Article III procedural rules dealing with hearsay and information coming from foreign governments (2009).

However, as argued by the Heritage Foundation's James Carafano (Carafano & Rosenzweig, 2004) and supported by DHS attorney Stephanie Blum (2008), the government's priority to prevent terrorist attacks requires some means of preventative detention for interrogation and intelligence collection. Though the government's position of holding enemy combatants in preventative detention without limits has been criticized by many, including the Century Foundation's Stephen Schulhofer (2009), as beyond reason and unlawful, this example substantiates the effectiveness and need for some form

of such a regime. Without delving into the debate on interrogation techniques, the principal observation which must be made is that the information collected from Zubaydah, KSM, Padilla and others permitted the U.S. national and homeland security apparatus to identify and disrupt what could be considered a devastating and deadly terrorist attack within the U.S. According to Kavanaugh, Padilla, in particular, did not divulge any information relating to his intent to carry out an attack while still in the custody of DOJ under the material witness warrant. It was not until a longer period of time, and the application of a sustained interrogation approach, that Padilla corroborates what Zubaydah, KSM, and others had revealed to intelligence and military officials (Kavanaugh, 2009). A supplementary point is the fact that both Zubaydah and KSM were held in preventative detention and provided crucial identifying information on Padilla and his plot.

A federal agent who spent significant time with Padilla while he was in DoD custody, described his interaction with Padilla as, “strictly for intelligence purposes,” with the understanding that any statements made by Padilla under his conditions of confinement would likely not be admissible in an Article III court. Nevertheless, the federal agent acknowledged that Padilla’s extended detention in DoD custody provided the opportunity to elicit a great volume of valuable and actionable intelligence. Utilizing a forensic and investigative approach that military interrogators were far less proficient, the federal agent was able to leverage the statements made by senior Al Qaeda detainees to get Padilla to not only confess to his intent to carry out a significant domestic terrorist attack but to also reveal critical information on fellow Al Qaeda operatives such as U.S. citizen Adnan El-Shukrijuma (Comey, 2004). Padilla also made known his overseas activities, Al-Qaeda tactics, training and practices, in addition to his operational taskings. One area of particular interest was how Al Qaeda recruited, trained and vetted a Hispanic American, allowing him to get next to the most senior levels of Al Qaeda leadership (federal agent (identity withheld), personal communication, August 4, 2009). In addition, the federal agent described how Padilla’s past experience with the criminal justice system from his days as a gang member led him to believe he could “hold out” until the government provided him a hearing or an attorney. As time

went on, when neither were provided, Padilla concluded this was not “business as usual” and that the only way out of his predicament was through cooperation with authorities (federal agent (identity withheld), personal communication, August 4, 2009).

As Kavanaugh states (2009), Padilla happened to fall perfectly into the Hassoun case and was simply added as a co-conspirator. However, despite the media and public perception of the case and trial, Padilla was not the main player. Padilla was a much smaller fish, albeit a much more dangerous one. In this regard, the government was extremely fortunate there were alternate criminal charges, albeit, less serious charges relative to what his intentions were, that could be brought at all against Padilla (Couch, 2007). Had this not been the case, the government may have had to let Padilla go free on the streets of the U.S. As stated by Kavanaugh, “this was not a case about what we knew but what we could prove in court with admissible evidence. The Article III process would not allow us to utilize the information we needed to prove his terrorist conspiracy” (2009).

Kavanaugh’s (2009) investigation of Hassoun reveals Padilla’s travel and attendance in the Al Farouq Al Qaeda training camp in 2000. This was substantiated when a “mujahedeen application form” containing Padilla’s information was obtained by Special Operations/Intelligence personnel in Kandahar in 2001 (Couch, 2007). This critical piece of evidence also presented its own set of unique problems. Issues with the collection of evidence and chain of custody are standard Article III procedures. Typically, law enforcement personnel must be able to testify as to who the “seizing agent” was and how and where the evidence has been handled and stored.

In 2001, when this document was collected in Afghanistan by superbly trained U.S. military forces, it was not recognized as a potential piece of damning evidence that would help convict a U.S. citizen jihadi. At that time, it was key intelligence that identified someone who appeared to be Al Qaeda trained and had natural access to enter the U.S. Exposing this information in public channels prior to positively locating the individual would have tipped him off to the U.S. government’s interest in

him and driven him to ground. For this reason among others, the application form, the information it contained and the specialized team that collected it made everything about it classified.

In this case, the government was able to get this piece of information and six years of FISA telephone intercepts declassified for use. However, the introduction of Padilla's Al Qaeda application recovered in Afghanistan was nearly derailed until a U.S. government intelligence agency allowed one of its officers to testify in disguise and not in true name (Kavanaugh, 2009). According to Kavanaugh, the intelligence officer did testify as to his custody of the document, where it was recovered and that he had provided it to an FBI agent in the Afghanistan/Pakistan region. Kavanaugh asserts that had the intelligence officer been required to testify about anything more substantive regarding his duties, contacts and methods, he would not have been in a position to disclose that information. Under those circumstances, the judge could rule his entire testimony, including the training camp application, inadmissible (Kavanaugh, 2009).

The extensive involvement of highly trained and secretive military special operations and intelligence units has brought about its own set of dilemmas. The U.S. Special Operations Command (SOCOM), U.S. intelligence community (USIC) paramilitary units, and foreign intelligence services are very reluctant to expose the identities of their operatives. In Article III courts, the prospect of these highly trained and heavily invested operatives having to publicly testify and risk exposing their identities is typically difficult to overcome.

In the Padilla case, the judge and prosecution were able to make it work but only due to the very limited amount of testimony that was needed to demonstrate the authenticity and origination of where the document was found. Certainly having an Al Qaeda training camp application containing Jose Padilla's personal information was a very powerful piece of evidence in the minds of any jury. Absent that convincing evidence, an element of doubt creeping into just one jury member could have set Padilla free. Kavanaugh makes a compelling point, stating, "We should not be treating Al Qaeda documents recovered in a battlefield or inaccessible environments the same way we

would handle subpoenaed bank records. Both are critical evidence but their origin and the means available by which we obtain them could not be more different” (2009).

Kavanaugh explained that the use of CIPA, facilitated having the judge, Marcia Cooke, rule against the defense’s request to have a significant amount of classified information turned over for discovery requirements (2009). In this instance, Kavanaugh stated that the government was fortunate the judge was not a justice who interprets the discovery rules in an excessively broad manner; however, her ruling on the inadmissibility of some classified evidence deemed hearsay is also the basis for the defense’s appeal (2009). In this instance, the government was able to declassify a fair amount of information. However, classified information originating from a foreign government who does not want their cooperation with the U.S. to be made public, or exposing information that would reveal sensitive sources and methods is problematic and potentially damaging to a terrorism case such as Padilla’s. Non-compliance with an order to declassify and make the information available to the defense would result in government having to abandon certain counts or the entire indictment all together.

Mukasey (2007) provides the examples of the prosecution of Omar Abdel Rahman (the “blind sheik”) for his role in the 1993 World Trade Center bombing. The government was compelled to turn over a list of unindicted co-conspirators to the defense, which included the name of Osama bin Laden. Within days, a copy of that list was obtained by bin Laden in Khartoum, informing him that his connection to that attack and its operatives had been discovered. Mukasey also points to the trial of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing, when a nondescript bit of public testimony concerning a cell phone battery alerted terrorists still at large that one of their communication links had been compromised. The government had been monitoring that node of communication, which had provided enormously valuable intelligence. Following its disclosure, the node was immediately shut down and further information lost (Mukasey, 2007).

In August 2008, Padilla was convicted on all three counts for which he was charged, and in January 2009, he was sentenced to 21 years in prison (Whoriskey & Eggen, 2008). However, due to the nature of the information that could not be brought to

trial, Padilla escaped being indicted on a more serious charge of U.S.C. 18 sec 2332(b), Conspiracy to Commit Acts of Terrorism Transcending National Boundaries. Despite the government's request for a sentence of life in prison, the judge handed down only 21 years reduced by three years and eight months for the time Padilla served in the Charleston Navy brig while in military custody. At sentencing, Judge Cooke expressed, "I do find that the conditions were so harsh for Mr. Padilla . . . they warrant consideration in the sentencing in this case" (Whoriskey & Eggen, 2008). Cooke also expressed that because all of the defendants in the case, including Padilla, did not actually commit acts of violence in the U.S. or against U.S. persons, their sentences did not warrant more stringent punishments, such as 35 years to life. However, Zacarious Moussaoui never carried out acts of violence in the U.S. or against U.S. persons, but was sentenced to life in prison, ultimately pleading guilty following a controversial four-year trial (Roh, 2005). As Kavanaugh stated, "this case is not an example of an adequate solution to the problem, had the judge been able to consider a conviction on conspiracy to commit acts of terrorism involving the use of radioactive material or the intent to bring down an apartment complex, it would be likely Padilla would have gotten 35 years to life" (2009).

## **2. Al-Bahlul Case**

### **a. Key Takeaways**

1. The Military Commissions' greater flexibility allowed for charging Al-Bahlul with more significant terrorism charges in a manner more efficient in its presentation to the jury and its execution of the prosecution.
2. Military Commission rules allowed for the adequate protection and substitution of classified information presented as evidence, which played a key role in the conviction of Al-Bahlul.
3. The use of hearsay statements from other detainees set the foundations for the use of MCRE 505 substitutions of classified information.
4. The Military Commission process provided protection of the identity of "at risk persons" such as military personnel and other government agency personnel involved in Al-Bahlul's prosecution.

5. The full integration of federal law enforcement agents into military & intelligence special operations units would enhance the government's ability to facilitate the use of information collected during the capture of a high value terrorism subject as evidence in his prosecution.
6. The Military Commission of Al-Bahlul clearly demonstrated legitimate due process to the accused, was successful in achieving a substantive "end game" conviction while protecting national security concerns.

**b. *Bin Laden's Media Man***

In 2006, President Bush declared, "We will continue to bring the world's most dangerous terrorists to justice," while petitioning Congress to pass a bill that would balance the government's need to protect the sources, methods, techniques and activities utilized to collect classified information in order to prevent terrorist attacks, while at the same time, adhering to transparent constitutional principles and due process (Mariner, 2008). That same month, Congress passed the 2006 Military Commission Act, which allowed detained terrorist suspects to be prosecuted in military commissions (Mariner, 2008). To date, due to the Military Commission system having faced nearly endless legal challenges and appeals from opponents and a recent suspension by President Obama (CNN, 2009), it has frustratingly heard three cases: Australian citizen David Hicks, a former kangaroo-skinner who pled guilty to Material Support to Terrorism (DefenseLink, 2007), Salim Ali Hamdan, a driver for Usama Bin Laden who was found guilty of Material Support to Terrorism, and Ali Hamza Ahmad Suleiman Al-Bahlul. Hicks and Hamdan were not considered high value terrorists. Both received light sentences by the commission's jury. More importantly, each, as well as Al-Bahlul's trial, were dress rehearsals in preparation for the more substantial cases in the queue for the government to test and adapt to the procedural issues it will rely on to convict terrorists such as 9/11 mastermind Khalid Sheik Mohammad (Mariner, 2008).

Caught in Pakistan in late December 2001 while attempting to flee the region following the fall of the Taliban, Al Bahlul was charged under the authority of the 2006 Military Commissions Act with 10 U.S.C. § 950v(b)(28), Conspiracy; 10 U.S.C. §

950u, Solicitation to commit Murder of Protected Persons, in violation of 10 U.S.C. § 950v(b)(1), to Attack Civilians, in violation of 10 US.C. § 950v(b)(2), to Attack Civilian Objects, in violation of 10 US.C. § 950v(b)(3), to commit Murder in Violation of the Law of War, in violation of 10 US.C. § 950v(b)(15), to Destroy Property in Violation of the Law of War, in violation of 10 U.S.C. § 950v(b)(16), to commit acts of Terrorism, in violation of 10 U.S.C. § 950v(b)(24), and to Provide Material Support for Terrorism, in violation of 10 U.S.C. § 950v(b)(25) (DefenseLink, 2008). Office of Military Commissions (OMC) prosecutor Major Dan Cowhig explained that the government brought all the propaganda work committed by Al-Bahlul under the solicitation charge as a single continuous act. Cowhig explained it would be far simpler to treat all the acts of solicitation as a single course of conduct than to parse each solicitation out as an individual offense. This allowed for each act of solicitation to fall under the same statute, just under different instances. According to Cowhig, the authority to assert a count or offense for each act of solicitation (i.e., for each viewer of the USS Cole propaganda video produced by Al-Bahlul) is applicable, but it was more efficient to merge them and run them concurrently under the Military Commission Act for the purposes of trying the case, assisting the jury's comprehension of the case, as well as for sentencing (Cowhig, 2009).

An immediate comparison of the charges brought against Al-Bahlul and those against Jose Padilla reflect more charges that are significantly more severe in their presentation and application. Both men were charged with Conspiracy and Material Support. However, a closer review of Al-Bahlul's Conspiracy charge demonstrates the government's ability to outline Al Bahlul's considerable contribution to Al Qaeda and Usama Bin Laden. Specifically, a summary of the 2008 sworn Office of Military Commission (OMC) Charges state:

Al Bahlul willfully joined the Al Qaeda enterprise and willfully entered into agreement with Al Qaeda and Usama Bin Laden with the intent to further the unlawful purposes outlined in the charges, and knowingly committed the following overt acts in order to accomplish some objective or purpose of the enterprise and the agreement:

1. Traveled to Afghanistan with the purpose and intent of joining Al Qaeda;
2. Met with Saif Al Adel, the head of the Al Qaeda Security Committee, as a step toward joining the Al Qaeda organization;
3. Underwent military-type training at an Al Qaeda sponsored training camp located in Afghanistan near Mes Aynak;
4. Pledged fealty, or “bayat,” to the leader of al Qaeda, Usama bin Laden, joined al Qaeda, and provided personal services in support of al Qaeda. (Al-Bahlul, 2008)

These four specified acts were undertaken by both Padilla and Al-Bahlul with the only difference being Padilla met with Abu Haffs Al Masri (Comey, 2004; federal agent, personal communication, August 4, 2009) and not Saif Al Adel. However, Padilla’s actions in this regard are never mentioned in his indictment because the source, other detainees, of the information were not available to testify or inadmissible due to the information being hearsay or coming from Padilla during his preventative detention (federal agent, personal communication, August 4, 2009). There are seven additional acts listed against Al Bahlul which outline his actions as Bin Laden’s personal secretary and his appointment as the head of Al Qaeda’s media and propaganda wing, As Sahaab (Kohlmann, 2008). In this position, Al Bahlul carried out an order by Bin Laden to produce a propaganda video depicting the attack on the USS Cole (DefenseLink, 2008). These specifications resemble the Material Support charges brought against Padilla though the material support was provided in different ways by each.

In a review of Al Bahlul’s September 2008 Commission transcript (page 192), he expressed his regret that he was not a part of the group that carried out the 9/11 attacks. Despite his desire to carry out violent attacks, Al Bahlul principally served in a support role as an administrator for Al Qaeda, liking to refer to himself as a “media man” (Cowhig & Al-Bahlul, 2009). Yet, in comparing the known facts that Padilla was a terrorist operative sent to actually conduct a violent attack utilizing a weapon of mass destruction to Al Bahlul, who was never tasked with such an action, it is disturbing that Padilla, convicted on all his counts, only received 21 years as opposed to the life sentence handed down to Al Bahlul.

According to Cowhig, well over half of the evidence discovered and utilized in Al-Bahlul's trial was of a classified nature at the start of the process. Through intricate coordination within the U.S. counterterrorism interagency, Cowhig revealed OMC was able to have some of the material declassified, but in many instances, developed Military Commission Act (MCA) judicially sanctioned redactions or substitutions. As an example, Cowhig stated the use of the 2000 Predator footage showing the Bin Laden Tarnak Farms compound in Afghanistan was deemed classified by a U.S. intelligence agency. Instead, OMC was able to utilize the identical footage leaked and shown on MSNBC (Cowhig, 2009). This physical evidence was then authenticated by the testimony of a U.S. government agent who had conducted a sensitive site exploitation of Tarnak Farms following 9/11. The government agent was able to confirm the location and physical characteristics of the compound (Al-Bahlul, 2008; Cowhig, 2009).

Cowhig explained that one of the differences of the MCA Commission process is that it does possess a greater leeway in the use of hearsay statements from individuals who would not be available as a witness at trial. Those witnesses could range from other detainees, unavailable U.S. or foreign government agents, a confidential intelligence source, or a foreign national who is not subject to compulsory process. The use of hearsay has some common "exceptions" that are permitted in Article III courts in order to prove a fact in controversy where there is good reason to believe the hearsay is reliable. These exceptions include dying declarations, statements against self-interest and spontaneous utterances. The MCA has provided additional exceptions not admitted in Article III courts for the reasons of protecting classified information or the inability to present a witness, as those described above, at trial (Cowhig, 2009). While this expanded MCA hearsay is an important distinction, Cowhig sturdily stressed the lack of value hearsay has to providing direct proof of the elements to the specified charged offenses. While the use of hearsay under the unique MCA exceptions can be seen as an advantage, it can only be effective so long as the hearsay is deemed to be or can be shown to be reliable. Basing a charge on hearsay absent reliability has the potential to not only scuttle the charge levied but also the case in its entirety.

Effect use of any MCA unique hearsay must also be sustained with parallel evidence such as documents, electronic media, or eyewitness accounts (Cowhig, 2009). Cowhig informed the hearsay utilized in the Al Bahlul commission set foundations for the relevance of certain pieces of classified evidence in which the use of MCRE 505 permitted substitutions granted by the presiding Military Judge. In this regard, Cowhig explained that if he had been unable to set those foundations and utilize the substitutions for the classified evidence where the unrefined origins of a piece of evidence would have revealed sources, methods, techniques or activities, the case would have been almost impossible to successfully prosecute. While Cowhig was able to utilize these mechanisms effectively in prosecuting Al-Bahlul, he stated the limited presentation of hearsay in this case was not a major factor and did not fall within any of the unique MCA exceptions. While the unique MCA hearsay exceptions can provide an increased ability to protect and present classified evidence, it must not be seen as the magic bullet that will solve the problem in utilizing classified evidence. As stated by Cowhig, “you can't prove a case with hearsay, but you can lose a case with hearsay” (2009).

Cowhig stated some agencies are very reluctant to have their operatives and officers testify, even in a Commission environment (2009). It is also preferable to have a law enforcement type who can take the witness stand in those instances (Cowhig, 2009). A review of the Al-Bahlul trial transcript (pp. 300–700) supports Cowhig’s assertion, as no less than five law enforcement personnel testified openly to issues of evidence recovered or statements made by Al-Bahlul during his interrogations compared with one military intelligence officer whose identity was concealed (Al-Bahlul, 2008). This example sustains the concept of fully integrating federal law enforcement personnel, such as highly trained FBI counterterrorism special agents, into intelligence and military special operations units.

Bringing the law enforcement capability to SOCOM units would establish an immediate open chain of custody for material collected on target and promote proper handling of that evidence while it is being treated as intelligence information. A central strategy interagency team would be the ideal venue for this concept to be fully developed. It could not only establish the process for how such an integration would work but also

develop criteria defining when and how federal law enforcement agents would be involved in operations targeting identified high value terrorist targets.

A review of the Al-Bahlul trial transcript (pp. 1–300) demonstrates that Al-Bahlul was in many instances his own worst enemy. During early proceedings leading up to his trial, he made countless incriminating statements in open sessions despite being warned by the presiding judges it was not in his best interest to do so. Regardless, as supported by Nine Eleven Finding Answers (NEFA) Foundation senior investigator, Evan Kohlmann, Al-Bahlul’s interrogation with FBI agents provided not only a wealth of intelligence information on the Al Qaeda organization, its senior members and its media wing but also countless incriminating statements by Al-Bahlul himself while in preventative detention (2008).

### **3. Reid Case**

#### **a. Key Takeaways**

1. The lack of a legal preventative detention regime hamstrung the U.S. government in thoroughly interrogating a captured terrorist for critical real time intelligence following his disrupted attack.
2. Lack of central leadership and coordination within the counterterrorism community prevented critical information from being provided as evidence for prosecution of a terrorist subject.
3. The lack of a legal preventative detention regime and the inability of Article III courts to utilize hearsay prevented the incriminating statements of detained senior Al Qaeda leaders from being available in Reid’s prosecution.

#### **b. The Shoe Bomber—Predecessor to the Underwear Bomber**

In a January 2008 publication for the American Constitution Society, Steven Schulhofer, while holding up Shoe Bomber Richard Reid’s successful post 9/11 conviction as an example, contended that Federal Article III courts are already well equipped to protect classified information and achieve terrorism convictions (2008). However, a closer examination of the Reid case clearly demonstrates that Schulhofer’s

use of Reid as a shining example is not well founded. The case exposes not only the dangerous holes in the system but the lack of central coordination within the counterterrorism community.

In refuting Schulhofer, Reid was one of the few terrorists to actually be caught in the act of attempting to blow up an airliner—and live to plead guilty to it. Bolstered by the roughly 100 eye witnesses on the aircraft, the seizure of his shoe bomb as evidence and his own admissions in a very limited post arrest interrogation, the government's need to affirmatively use classified information was negligible (Lever, 2009). Classifying Reid's case as a “conviction” is disingenuous when in fact he pled guilty to 18 U.S.C. § 2332(a)(1) Attempted Use of a Weapon of Mass Destruction (U.S. v. Reid, 2002).

Of greater concern are the facts that following the successful disruption of Reid's attempted terrorist act by the passengers of American Airlines Flight 63, FBI Special Agents Brad Davis and Dan Choldin were afforded less than 36 hours to interrogate Reid for intelligence purposes (Davis, 2009). In one respect, according to Davis, the FBI was fortunate that Reid decided to try and commit his act on a Saturday. Since his arrest occurred over a weekend, the next available time to take him before a magistrate for his mandatory initial appearance was Monday morning, when the courts were open. The government was lucky that it actually got about 36 hours to interrogate Reid not only about his culpability but also about other potential plots and operatives. Had Reid been arrested on any other day of the week, Davis and the FBI would have been obliged to present him within 24 hours, at which point he would have been assigned an attorney who would have advised his client not to speak to the government any further.

In Reid's case, according to Davis, this is exactly what happened once Reid appeared in court on the following Monday. It was not until 2007, six years following his guilty plea, that Davis and Choldin were finally able to approach and interview Reid at the SuperMax Federal prison in Colorado (Davis, 2009). According to Davis, Reid's case makes an excellent example of the need for a preventative detention regime to collect intelligence, evidence and prevent follow-on attacks. Davis and

Choldin conducted two interviews of Reid during their window of opportunity between Saturday and Monday in December 2001. In both instances, Reid was read, and waived, his Miranda warnings. Davis attributes this to the fact that Reid claimed he did not recognize western law and was proud to take credit for the plot and its details (Davis, 2009). Investigation later proved Reid's claim to be untrue. Though Reid was happy to talk to the FBI without counsel at the outset, according to Davis, Reid initially would not identify anyone else involved in the plot, and it was Reid's own blunders that permitted Davis and Choldin to utilize classic investigative techniques, outside of the classified realm, to uncover the true extent of the plot and undeniable connections to Al Qaeda (Davis, 2009).

It was Davis and Choldin's outstanding professional investigative skills that led to the identification of a second shoe bomber, Saajid Badat, who was arrested and pled guilty in the U.K. in 2005 (Timesonline, 2005). Much of the evidence used against Badat was derived from the Reid investigation. According to Davis, even in the limited amount of time he and Choldin had in speaking with Reid, they were successful in identifying four additional e-mail accounts from the one account Reid admitted to having. One of the identified accounts was deemed a covert account that Reid utilized in Paris to contact his Al Qaeda handler in Pakistan to notify he had been denied boarding earlier that day. French authorities, working with the FBI, successfully secured the computer Reid had used at the hotel he stayed which provided even further intelligence and evidence of the plot (Davis, 2009).

Even then, the government was opportune. In late 2001, *Wall Street Journal* (WSJ) reporter Alan Cullison, while in Afghanistan, came into possession of a laptop computer that contained significant amounts of Al Qaeda information (Cullison, 2002). Contained on the computer was a trip report outlining in detail and matching perfectly to the travel itinerary given by Reid in his statements to Davis and Choldin. According to Davis, Cullison responsibly provided the laptop to operatives of a U.S. intelligence agency, but not before making a full copy of the computer's contents for the WSJ. When Davis and Choldin were made aware of this critical piece of evidence that directly tied Reid to Al Qaeda, they quickly sought to examine the computer and its

contents. Following extensive deliberation and persistence, Davis and Choldin were eventually permitted to visit the U.S. intelligence agency's headquarters to review the contents of the laptop (Davis, 2009).

However, the intelligence agency would not permit the trip report and other key documents to be declassified. Nor were Davis and Choldin permitted to take their notes with them following a through review of the laptops contents. Ultimately, Davis was forced to subpoena the contents of the laptop from the WSJ in order to utilize the intelligence information as evidence for the case (Davis, 2009). Davis states he was also able to obtain first-hand accounts from Guantanamo detainees Feroz Abbasi, Abu Zubaydah, and KSM regarding Reid's Al Qaeda affiliation and terror assignment. However, Davis and Choldin were unequivocally told those statements would never be permitted for use in Reid's prosecution (Davis, 2009).

The case of Richard Reid is frequently held up by critics of military commissions as a shinning example that the civilian Article III system can meet the national security and prosecutive challenges of the modern day terrorism threat. However, even with the incredible investigative work accomplished by special agents Davis and Choldin, the U.S. government in many respects was very propitious any one of a number of things did not turn out differently. The government was fortunate Reid's Al Qaeda trip report was collected by a WSJ reporter who maintained possession of the information, which made it subject to subpoena. The government was fortunate that Reid did not adhere to his own Al Qaeda training outlined in the Manchester document regarding interrogation, deciding instead to waive his Miranda rights and speak with the FBI. The government was fortunate that Reid made mistakes when providing information that he thought would not incriminate him. The government was fortunate that first-hand accounts by captured Al Qaeda terrorists would not be needed due to excellent investigative skills of Davis and Choldin, coupled with the government's other fortunate breaks. The government was lucky that Reid could not light the bomb on his shoe. The government was fortunate Reid chose to plead guilty and was subsequently

sentenced to life in prison instead of turning his trial into a circus like his Al Qaeda co-conspirator Zacarious Moussaoui. The government is fortunate to have outstanding investigators like Davis and Choldin.

#### **4. Mutallab Case**

##### **a. Key Takeaways**

1. The lack of a legal U.S. preventative detention regime hamstrung the U.S. government in thoroughly interrogating a captured terrorist for critical real time intelligence following his disrupted attack.
2. Lack of central leadership and coordination within the counterterrorism community resulted in critical information from being fused and analyzed in order to prevent a terrorist attack.

##### **b. The Jihad Jockey—Taking a Cue from Reid**

On December 25, 2009, Christmas Day, a 23-year-old Nigerian man, Umar Farouk Abdul Mutallab, attempted to detonate an improvised explosive device (IED) hidden in the crotch of his underwear (DeYoung & Fishel, 2010). Much like Richard Reid's attempt to ignite his explosives laden shoes, Mutallab, either by defect in the IED, incompetence or both, in conjunction with the brave actions by the passengers, failed to carry out his intended murderous act of terrorism. Following his arrest in Detroit, and much like Reid, Abdul Mutallab spoke with FBI investigators and provided critical information. Mutallab revealed that he was provided the training and explosives needed for the operation by members of Al Qaeda in the Arabian Peninsula in Yemen (Obama, 2010; Schmitt & Lipton 2009). Following his arrest, Mutallab's initial court appearance was conducted in his hospital room where he was appointed an attorney and refused to answer further questions by investigators (Meserve & Quest, 2009). Identical to the Reid case, the U.S. government had in its custody an Al Qaeda operative who was apprehended immediately following his failed attempt to bring down an airliner. Also

like Reid, despite Abdul Mutallab's initial willingness to talk and provide critical intelligence to the FBI, that conduit of information was shut off once he was entered into the traditional Article III criminal process.

In remarks given to address the Christmas Day plot, President Obama stated, "In our ever changing world, America's first line of defense is timely, accurate intelligence that is shared, integrated, analyzed, and acted upon quickly and effectively" (2010). With respect to the President's remarks, surely there could be nothing more timely or critical in order to take immediate action than extracting the information possessed by failed terrorist operative.

Following the President's remarks, the White House released a summary review of the issues that lead to the Christmas Day 2009 attack. Two of the three principal findings in the report stated: 1)

A failure of intelligence analysis, whereby the CT community failed before December 25 to identify, correlate, and fuse into a coherent story all of the discrete pieces of intelligence held by the U.S. government related to an emerging terrorist plot against the U.S. Homeland organized by al-Qa'ida in the Arabian Peninsula (AQAP) and to Mr. Abdulmutallab, the individual terrorist.

And 2)

A failure within the CT community, starting with established rules and protocols, to assign responsibility and accountability for follow up of high priority threat streams, run down all leads, and track them through to completion. (White House, 2010)

The report stated that the National Counterterrorism Center (NCTC) is the primary organization that provides situational awareness to the counterterrorism community of ongoing terrorist threats and events via daily written reports, meetings and video teleconferencing in order to summarize current threat reporting (White House, 2010). While the threat warning system involves analysis, it also extends to the other participants in the counterterrorism community that should be responsible for following up and acting on leads as a particular threat situation develops (White House, 2010).

While the report's findings did conclude the sharing or availability of intelligence was not at issue, the means and speed by which different agencies provide the intelligence to NCTC was a contributing factor.

The President subsequently issued a presidential memorandum outlining immediate corrective actions for nearly all participants in the counterterrorism community. One corrective action of particular importance was directed to the National Counterterrorism Center whereby the President directed NCTC to, "Establish and resource appropriately a process to prioritize and to pursue thoroughly and exhaustively terrorism threat threads, *to include the identification of appropriate follow-up action by the intelligence, law enforcement, and homeland security communities* [emphasis added]" (White House, 2010). While the President's directive to NCTC is fitting, NCTC does not currently possess the authority nor influence to direct the operations or actions of the intelligence, law enforcement, or homeland security participants within the counterterrorism community.

### **C. SUMMARY ANALYSIS BASED ON THE KEY ASSUMPTIONS AND QUESTIONS**

While it is good to be lucky, relying on luck is not a sound counterterrorism strategy. Examining the Padilla, Al-Bahlul, Reid and Mutallab cases demonstrates that dealing with the international terrorism issue is not solely a military, intelligence, or law enforcement predicament. As summarized by Judge Mukasey (2007, 2009), Special Agent Kavanaugh (2009) and Captain Howard (2009), the complexities and consequences of modern day international terrorism make it something that falls in between these schemes, thereby indicating the correct solution is some composite of all of the above. If the first priority of the U.S. counterterrorism strategy is to prevent the next attack, and a subsequent priority is to seek fitting justice of those who plan, support and carry out acts of terrorism, then what can be derived from these cases?

One can recognize the deficiencies that currently exist in Article III courts when coupled with the need to derive intelligence from captured terrorists. The Padilla, Reid and Mutallab cases demonstrate that the U.S. government's deficiency in being able to

hold and interrogate a terrorist subject while either being in possession of intelligence indicating his intent, or in Reid and Mutallab's cases, being caught in the act. In the Padilla, Reid, and Mutallab cases, the priority to identify plots and operatives was at stake. In Padilla's case, he was controversially designated an enemy combatant and interrogated under a law of war convention. In Reid and Mutallab's cases, the government's inability to question him at length to satisfy its first priority is a critical factor considering it was shut out once they were formally entered into the Article III criminal system.

One can also witness the inadequacy of the Article III system not built to handle various aspects of the military and intelligence information derived from counterterrorism operations. The Padilla and Al-Bahlul cases demonstrated the involvement of military and intelligence special operations units in obtaining valuable evidentiary information. Furthermore, the cases demonstrate the problematic testimonial requirements these personnel must contend with as a result of executing their duties. One can recognize the need for central planning, strategy and doctrine development in dealing with terrorism subjects even before they are captured. The Padilla, Reid, and Mutallab cases demonstrated a lack of counterterrorism planning, strategy coordination or follow through on threat stream information. In Padilla's case, had there been superior planning and coordination based on the intelligence in the government's possession then the use of the outdated material witness warrant would have been unnecessary to arrest Padilla. Furthermore, had classified information been available earlier in his detention under the material witness warrant, then perhaps formal criminal charges could have been brought that would have made his designation as an enemy combatant unnecessary.

As demonstrated in the Padilla and Reid cases, valuable intelligence information was unavailable for use as evidence due to the lack of a legal preventative detention system and the inability to introduce detainee hearsay statements for national security interests. In Padilla's case, that information would most likely have sent him away for far longer than 17 years, probably for life. As of today, Padilla will likely be out of prison at the age of 53. Usama Bin Laden is 60, and it would be difficult to claim that even at his age he is not considered a dangerous threat. While both Reid and Al-Bahlul

received life sentences, in Reid's case, he was literally caught in the act and chose to plead guilty. Al Bahlul's case demonstrated the ability of the Office of Military Commission prosecution team to deal with a considerable volume of classified information while having the time to work within the counterterrorism interagency to get a majority of it either declassified or substituted for use in trial. The existence of a central interagency team would enable the development of mechanisms to enhance cooperative effort, much like in the Al Bahlul case, ensuring the proper endgame for a dedicated terrorist such as he is.

All three cases demonstrated that the current rules dealing with the use of hearsay and discovery are key stumbling blocks in producing an effective "endgame" for terrorist subjects. The preventative detention situations of both Al-Bahlul and Padilla, in addition to other high value detainees, produced not only a plethora of highly valuable intelligence information but also damning evidence. Ultimately, these cases clearly demonstrate that the government, in many instances, has been fortunate to avoid being presented with more formidable challenges, considering the holes in the system. However, Al Qaeda and other sophisticated terror groups such as Hizballah have clearly demonstrated their ability to adapt. Hence, the U.S. counterterrorism community must also adapt since it cannot expect that future captured terrorism subjects will act as dim-witted as Reid and Al-Bahlul, or be as fortunate as it was in the Padilla and Reid cases. The U.S. government counterterrorism community must plan for the worst-case scenario and do so in such a way that meets the first priority of preventing attacks.

The central question of this thesis sought to determine if the civilian Article III system is able to meet the national security demands of the modern day terrorism threat. When considering the issues and deficiencies presented in these cases studies, it is evident that significant problems exist which not only place the U.S. at great risk but also inhibit the government's ability achieve adequate end game convictions. The problems exposed here raise the questions of how the government can bring together the intelligence and evidence disciplines. What steps can be taken to assimilate the national/homeland security and criminal justice regimes? In what ways can the U.S. proceed to fuse the essential elements of disruption, intelligence collection, and

prosecution? In the following chapter, a look at one of the most contentious issues will be discussed—that of a legal U.S. preventative detention regime. A careful study of the preventative detention regimes of other democracies coupled with a recommended course of action on how a U.S. preventative detention regime can work will act as the link to other recommended steps. These recommendations can go a long way to meeting the U.S. security demands while enhancing the facilitation of classified intelligence information as evidence to meet the “endgame.”

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## **IV. PREVENTATIVE DETENTION AND CLASSIFIED STATEMENTS, FOREIGN LESSONS FOR ENSURING THE “ENDGAME”**

### **A. THE PREVENTATIVE DETENTION DILEMMA**

The terror attacks of September 11 brought a substantial shift in the way the United States historically dealt with the issue of terrorism and those who committed and supported terrorist acts. Moving from the pre-9/11 reactionary law enforcement doctrine to an offensive military approach, the shift has fundamentally challenged the philosophic balance between freedom and security. The restructuring of U.S. national security priorities now demands pre-emption of terrorist attacks at the forefront of the counterterrorism effort. This prevention first mantra necessitates the aggressive collection of essential intelligence from all available sources, particularly from the interrogation of captured terrorist subjects. As stated by former Assistant Deputy Attorney General John Yoo, perhaps the most effective weapon in this asymmetrical conflict is the intelligence gained from captured operatives in order to prevent terrorist attacks (2006). The difficulty currently facing the U.S. is the time needed to adequately interrogate a subject does not appear to mesh with the basic due process elements of the Fourth, Fifth and Sixth Amendments of the Constitution or the writ of *habeas corpus*, found in the suspension clause of Article One, section nine.

Changes in domestic and international law have spurred the debate regarding the rights of accused terrorists in judicial proceedings held before Federal Article III courts and military commissions (Boeing 2007). In *Hamdi vs. Rumsfeld* and *Hamdan vs. Rumsfeld*, the Supreme Court issued opinions on the scope of the writ of habeas corpus, the perpetual detention of foreign enemy combatants and the rights of U.S. citizens held as enemy combatants (Hamdi v Rumsfeld, 2006). Coinciding with President Obama’s executive order (E.O. 13492, 2009) to close the Guantanamo Bay Detention Facility and the suspension of military commissions (Shane, Mazzetti & Cooper, 2009), determining an appropriate judicial forum along with the substantive and procedural rights due to the

accused have become serious matters of debate. Directly correlated with these issues, is the government's current lack of any clear or consistent policy on where and how captured terrorism suspects should be brought to trial (Schulhofer & Turner, 2005). These intertwined issues have become even more muddled with the recent decision to remove five of the 9/11 conspirators from the military commission system and try them in Federal Article III courts in New York.

While the current administration states it remains committed to closing the Guantanamo Bay facility, it has encountered significant problems and resistance in accomplishing the task. This was further compounded by the Christmas 2009 attempted airline bombing by Abdul Mutallab, who reportedly acknowledged that he was trained in Yemen by Al Qaeda on the Arabian Peninsula (Schmitt & Lipton, 2009). With nearly half of the current detainees at the Guantanamo Bay facility from Yemen (Finn, 2010) and with a recent Pentagon report indicating an increase in those released returning to terrorist activity (Mount, 2010), repatriating these individuals in order to facilitate closing the facility has become further problematic.

Regardless of the judicial forum, whether Federal Article III court, military commission or some variation of the two, the introduction, and use of classified information is guaranteed to be an issue. As explained by Schulhofer (2004, 2009) and Carafano (2006), the challenge of using and protecting classified information in terrorism prosecutions is arduous. Successfully achieving a consequential conviction can hinge on classified intelligence information collected among other means, such as subject interrogation (Schulhofer & Turner, 2005). In a similar respect, the ability to prosecute effectively a High Value Detainee (HVD) can be seriously compromised due to his preventative detention circumstances. The mere fact the HVD is under the control of the U.S. government without having customary criminal due process, places his prosecution in jeopardy. Moreover, it also potentially taints the information he provides during his detention towards the prosecution of fellow terror suspects. The quandary of how to judicially handle the 100 or so HVDs currently detained at the Guantanamo Bay prison provides an earnest example of the problem this unresolved issue brings. While it is

recognized that interrogation methods used against some of these HVDs has also complicated their prosecution, this aspect is not universal among the population (Shane, 2008).

The debate concerning a U.S. preventative detention system has been robust. Understandably, the concept of an American preventative detention regime is an uncomfortable one since the perception is that it cuts across democratic and constitutional principals. However, an examination of similar detention systems in other democratic nations and a closer look at the constitutional interpretation does offer potential solutions. The application of legislative action, strict checks and balances, with periodic review within a constitutional framework can provide a needed invaluable counterterrorism tool. In the spirit of Brookings Institute's Benjamin Wittes, the intention of this thesis is not to continue the debate of whether the U.S. should have a preventative detention regime but what can be learned from foreign allies to fashion a U.S. model. The intent is to demonstrate that an acceptable American preventative detention regime is possible and can facilitate the use of classified intelligence as invaluable evidence.

## **B. COMPARATIVE ANALYSIS OF FOREIGN SYSTEMS**

### **1. U.K. Model of Preventative Detention**

As the U.S. faces the dilemma of balancing its security with preserving its constitutional process and freedoms, what examples can it draw on to develop suitable solutions? In his opening remarks during a 2006 Senate Appropriations subcommittee hearing, Senator Judd Gregg summarized the effort by stating that a reactive mindset in dealing with terrorism does not work in the context of the threat that America faces (Senate, 2006). Gregg states the terrorist acts as those committed on 9/11, the 2004 Madrid train bombing, the London July 7, 2005 bombing or the disrupted 2006 U.K. airline plot cannot be tolerated, nor can a legal system structured around the concept of permitting a terrorist event to occur and then reactively having the criminals brought to justice (Senate, 2006). Gregg observes that the U.K. legal system, while not identical to the U.S., shares a natural commonality with the U.S. Bill of Rights having evolved from

English Common Law (Senate, 2006). The hearing sought to learn from the British experience in dealing with terrorism and determine if there are mechanisms that could be adopted while remaining within the context of the U.S. constitutional structure (Senate, 2006). From the testimony provided by Judge Richard Posner and Former Deputy Assistant Attorney General John Yoo, the U.S., contrary to public impression, is capable of facilitating nearly all aspects currently implemented in the British system within the American constitutional framework (Senate, 2006).

Primarily viewed as a law enforcement tool, the British preventative detention regime is currently referred to as “pre-charge” detention and has its origins dating back to the 1939 Prevention of Violence Act (PVA) during its conflict in Northern Ireland (Blum, 2008). Following its expiration in 1952, the PVA was reintroduced as the Prevention of Terrorism Act in 1974 and was again modified with the 2000 Terrorism Act. The significant change regarding the 2000 legislation is that it made the Terrorism Act permanent and no longer subject to yearly renewals. The pre-charge or preventative detention facets were similar in that British authorities could arrest and detain a suspect without charge on “reasonable suspicion” in conjunction with the certification of the Home Secretary (i.e., Attorney General). Amended again in 2003, the regime increased the maximum timeframe from seven to 14 days.

The most current form of the U.K. pre-charge detention regime was established with another modification in the Terrorism Act of 2006 whereby the government could detain a subject for a maximum of 28 days with approval of a designated magistrate. Following the initial 48-hour period, the crown prosecution must submit for judicial authority to extend the detention to seven days and for successive seven day periods up to the limit of 28 days. The final 14 days requires the authority of a High Court judge vice a designated magistrate (Blum, 2008). This tool was utilized effectively to disrupt the August 2006 U.K. airline plot to blow up 10 commercial planes over the Atlantic. Of the 24 suspects originally detained, eight were ultimately charged and prosecuted (Transportation Security Administration [TSA], 2008).

The British preventative detention system can be authorized in order to (1) obtain relevant intelligence/evidence by questioning the suspect; (2) preserve evidence or (3) to

ascertain the possibility of deportation or charging of the suspect (U.K. Terrorism Act, 2000). The 28-day detention period also allows for a more complete forensic examination of any electronic media obtained during the suspect's arrest. The detainee can be represented by a special counsel who is cleared to handle classified information and the process is monitored by an independent reviewer assigned by the Home Secretary, who scrutinizes each individual case of detention (U.K. Terrorism Act, 2000).

Most recently, the Prime Minister and British Parliament considered legislation, submitted by the Home Office, to extend preventative detention to 42 days in cases where the cooperation of foreign governments is necessary. The House of Commons narrowly passed the measure in the summer of 2008, but it was defeated in the House of Lords in October later that year (BBC, 2008). Despite the rejection of the 2008 measure, of significance is the involvement of the British Parliament, which provides legislative legitimacy, in conjunction with robust judicial oversight, which has been a staple of this detention regime since its reintroduction in 2000.

When comparing the counterterrorism or security framework of each country, the U.S. Congress is conspicuously absent. Essentially the U.S. has bypassed the criminal justice system and, as authorized by the President's war power privilege, categorized terrorist subjects as enemy combatants, pursuant to the laws of war. Not officially afforded the protections guaranteed under the Geneva Conventions against interrogation and until recently held incommunicado without legal representation for an indefinite period of time, the enemy combatant policy has come under intense debate (Blum, 2008).

However, in his 2006 testimony to the Senate sub-committee on appropriations, Judge Posner articulated that though the innovative anti-terrorist preventative detention measures available in the U.K. might violate a U.S. statute, it would not violate the Constitution. Supported by Professor Yoo, Posner proceeds to explain there is nothing in the Constitution that discusses a mandated 48-hour window in which an arrested subject must be charged or given a hearing. Posner explains that the 48-hour rule was established via the free interpretation of the Supreme Court relative to the due process clauses and could be remedied by Congress through legislative action authorizing a 15–30 day preventative detention regime (Posner, 2006).

## **2. Israeli Model of Preventative Detention**

With the door of legislative reform now open, additional lessons on preventative detention can be extracted from a careful review of the Israeli model. Though surrounded by much larger and hostile neighbors and having suffered over 152 attacks during a six-year period beginning in 2000, Israel maintains a rigorous yet transparent system with judicial oversight (Blum, 2008). Referred to as “Administrative Detention,” the Israeli model is solely to mitigate a threat posed to the state and public security by an individual whom intelligence identifies as posing such a threat. The Israeli system does not incorporate the purpose of administrative detention for trial and conviction, but simply to prevent dangerous identified threats from materializing into deadly attacks. Administrative detention can be an option when the information or intelligence is of a classified nature and is unavailable for use in a criminal trial (Gross, 2001).

The Israeli system draws its origin from the British Defense (Emergency) Regulations of 1945, enacted prior to the nation’s establishment. Israel modified the system under the 1979 Emergency Powers (Detentions) Law (EPDL). While the Israeli model is clearly more of a war or national security tool, it has an extensive judicial component of balance and oversight. EDPL provided more rights to detainees, including the requirement that a detainee be presented before the district court within 48 hours of arrest for judicial review of the detention, allows access to counsel, permits appeal to the Supreme Court and mandates three-month periodic reviews by the district court (Emergency Powers (Detentions) Law [EPDL], 1979). Unlike the British model, individuals can be subject to administrative detention for an indefinite period of time.

The Israeli model does possess separate systems of administrative detention for Israel proper vice the Palestinian Territories. The prime distinction being military commanders can detain a suspect within the Territories for up to six months at a time. The subject is entitled to judicial review within eight days of arrest, has access to counsel within 34 days, and possesses the ability to appeal to the Israeli Supreme Court for relief (Blum, 2008). The most recent modification to Israeli detention was established with the 2002 Incarceration of Unlawful Combatants Law. This legislation permits the detention

of “members of a force perpetrating hostile acts against Israel,” theoretically permitting the detention of suspects based on mere association with a terrorist organization such as Hezbollah. The law is differentiated from administrative detention by providing for access of counsel within seven days of detention, judicial review within 14 days and a right of appeal to the Supreme Court within 30 days. The law allows the detainee to be held until the Minister of Defense ascertains that the group with which the detainee is associated has ceased hostilities against Israel or until a court determines that the detainee’s release would not threaten state security (Blum, 2008).

Of particular notice in examining the Israeli preventative detention system, is the amount of judicial oversight provided to the regime, the rights of detainees to counsel and appeal while providing a means to protect classified or sensitive information and operations. Though the administrative detention system is not designed with the intended purpose of extracting information via interrogation, the 2002 Unlawful Combatants Law permits this activity. Israel has also differentiated between detentions as it applies to citizens and non-citizens in terms of the rules that are applied to each of those individuals. Both the U.S. and Israel appear to approach the issues surrounding the need for a preventative detention regime from the perspective of war. Both nations utilize similar terms in many instances often referring to unlawful combatants while stating the need to protect classified sources and methods. While the British approach appears to be more law enforcement centric, the U.K. system does permit for the “questioning” of a detained suspect as one of the principal reasons for executing the preventative detention authority.

### **3. French Counterterrorism Court**

The French counterterrorism strategy relies heavily on preemptive arrests, preventative detention, and a highly effective domestic intelligence-gathering network. The French perspective can be best articulated by senior French anti-terrorism judge Jean-Louis Bruguiere:

Terrorism is a very new and unprecedeted belligerence, a new form of war and we should be flexible in how we fight it. When you have your

enemy in your own territory, whether in Europe or in North America, you can't use military forces because it would be inappropriate and contrary to the law. So you have to use new forces, new weapons. (Whitlock, 2004)

Possessing some of the most aggressive anti-terrorism laws and policies in Europe, the French government has effectively disrupted radical Islamic threats for the past two decades. While other western nations struggle to balance security and freedoms, France has experienced little public dissent over its policies and tactics that would be controversial, if not illegal, in the United States (Whitlock, 2004). Following a wave of deadly attacks throughout the 1980s, which resulted from a failed “accommodation and sanctuary” policy, France adapted its approach with legislation in 1986 specifically to target terrorism (Shapiro & Suzan, 2003). One of the results of the 1986 legislation was that it centralized all judicial proceedings relating to terrorism while remaining within the Trial Court of Paris.

The French system employs an investigative magistrate or *juge d'instruction* who acts neither in the capacity of a prosecutor or defense counsel. The magistrate, who is considered politically independent, is charged with conducting the investigation, utilizing techniques and tools such as wiretapping, subpoenas, and search warrants. The magistrates work closely with the French domestic intelligence agency, Direction de la Surveillance du Territoire (DST), and the Division Nationale Anti-Terroriste of the Judicial Police (DNAT) as their investigative arms (Shapiro & Suzan, 2003). Over time, this system developed a cadre of well-informed and knowledgeable judges who came to be subject matter experts in the realm of terrorism and the groups who were targeting France. This system also enhanced the fundamental understanding between specific judicial authorities and those of the DST. This provided confidence to the DST that the judges understood the complexities of intelligence work and the threat judicial process can pose to intelligence sources and operations (Shapiro & Suzan, 2003). The DST can also go directly to the judges or to the prosecutors when they are in possession of information that they feel is criminal in nature and would warrant the opening of a criminal investigation.

While the prosecution of terrorism subjects is still solely handled by the traditional judicial court, the investigative magistrates possess the authority to convert an intelligence investigation into a traditional judicial investigation when the circumstances and facts warrant. The combination of expertise, enhanced coordination with the intelligence service and the judicial powers vested in the magistrates has established a powerful counterterrorism mechanism with great flexibility and efficiency (Shapiro & Suzan, 2003).

The differences in the U.S. and French legal frameworks are considerable and any suggestion to implement a similar investigative capacity by any of component of the U.S. judiciary is not only undesirable but also unwarranted. Nevertheless, there are concepts of the French Counterterrorism model that can provide valuable lessons for adaptations to existing U.S. legal constructs, particularly with respect to a U.S. preventative detention system. The U.S. already has the Foreign Intelligence Surveillance Court (FISC) authorized under the Foreign Intelligence Surveillance Act (FISA) of 1978.<sup>10</sup> The FISC is comprised of 11 judges and presides over the determination of applications, typically from the FBI, for the use of clandestine search warrants and electronic surveillance against suspected “agents of a foreign power” operating inside the United States. Because of the sensitive nature of its business, the FISC hearings are closed to the public, and, while records of the proceedings are kept, those records are not available to the public. Due to the classified nature of its proceedings, only government attorneys are usually permitted to appear before the FISC (Cohen & Wells, 2004).

The FISC provides an excellent legal platform from which the U.S. can readily facilitate the French counterterrorism court concept. In a U.S. version, the court’s function would not be one of determining innocence or guilt but to protect classified information, sources and methods during the determination of if a terrorist operative would be subject to preventative detention. This legal regime would facilitate not only

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<sup>10</sup> FISA, Pub.L. 95-511, 92 Stat. 1783, enacted October 25, 1978, 50 U.S.C. ch.36, S. 1566. FISA is an Act of Congress which prescribes procedures for the physical and electronic surveillance and collection of “foreign intelligence information” between “foreign powers” and “agents of foreign powers,” which may include American citizens and permanent residents suspected of being engaged in espionage and violating U.S. law on territory under United States control. FISA was amended in with the 2001 PATRIOT Act primarily to include terrorism on behalf of groups that are not specifically backed by a foreign government.

the priority of preventing terrorist attacks but also preserve the use of information and evidence at trial derived from detained operatives. Utilizing the FISC to function in its established capacity to hear counterterrorism-preventative detention petitions from the executive branch will be discussed in more detail in the proceeding chapter.

### C. SUMMARY

The major issue facing the U.S. is how it intends to proceed in regards to providing an acceptable legal solution to its preventive detention dilemma. In the eight years following 9/11 and amidst intense debate, both the executive and legislative branches of government have been timid in not aggressively seeking to combine elements of existing democratic preventative detention systems that meet the needs of national security within the American constitutional framework. In a May 2009, President Obama stated that he recognized the national security requirement of a preventative detention system for terrorists who, “the government may have trouble prosecuting but who are also too dangerous to release” (Finn, 2009; Obama, 2009). The U.S. must seek to accomplish both facets of: 1) not releasing dangerous terrorists by, 2) convicting them with effective and fair prosecutions. A legal preventative detention regime will go a long way in meeting these objectives and the evidence obtained from such a system is critical to meeting an end game objective. The President also stipulated the requirements for such a regime in that they are:

1. Fair
2. Contain federal judicial oversight and
3. Created by an act of Congress.

The President called for a system that is “clear, defensible, with lawful standards, possessing a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified” (Finn, 2009; Obama, 2009). While President Obama has defined the characteristics an American preventative detention regime must possess, he does not address the tactical and practical requirements that must accompany such a system if it is to be capable of supporting the pre-emptive attack priority while ensuring a

prosecutive endgame. The lessons provided by British, Israeli and French allies bestow a clear guide to a highly valuable prevention and end game tool. The next chapter will fashion the steps the U.S. government can take to fill the holes in the Article III process demonstrated in the case study analysis. These steps, which include a detailed framework of a U.S. preventative detention system, are doable and will greatly enhance meeting the endgame objective.

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## **V. THREE RECOMMENDED STEPS FOR ENSURING THE ENDGAME**

In chess, the endgame refers to the stage of the game when there are few pieces left on the board. While the distinction between where the “middle game” and “endgame” split is not often clear, the shift from one to the other can occur gradually or with a rapid succession of a few moves. Significantly, the strategic concerns and characteristics of the moves of the middle game and endgame are considerably different. Endgames in chess involve attempting to promote pawns in rank and utilizing the king, typically protected during the middle game, as an attacking piece by bringing it to the middle of the board. In the endgame, the stronger side seeks to exchange pieces (knights, bishops, rooks, and queens), while not concerning itself with the exchange of pawns. This strategy generally transforms the stronger player’s advantage into a victory (Silman, 2007).

The modern era terrorism threat is not a board game, but the concept of strategic moves is analogous. The repercussions of losing are severe, particularly in an age when weapons of mass destruction appear to be more accessible than at any previous time. The U.S. has rightfully made aggressive moves since September 11 but with considerable criticism in many respects. These aggressive moves have transitioned the U.S. from the middlegame to the endgame. However, have all the precipitating moves, or lack thereof, possessed the characteristics indicative of playing in the endgame? To capitalize on its advantage and put away the opponent, the U.S. must also transition to an endgame strategic mindset and make moves such as bringing its king to the center of the board. This chapter proposes three principal recommendations the U.S. can readily enact if it is bold enough. These steps are the type of moves executed in the endgame. These steps will be considerable in knocking off and putting away, a checkmate as it were, the knights, bishops, rooks and queens of America’s terrorism enemy. These steps facilitate the use of classified information as evidence while protecting the systems and values that are uniquely American. They bring about an endgame result of checkmate for the terrorist opposition.

The three principal recommendations in this chapter seek to:

1. Establish NCTC as the standalone counterterrorism organization with the authority to conduct not just the strategic planning but the coordination and execution of the counterterrorism mission.
  2. Establish a legal U.S. preventative detention system by blending elements of the British and Israeli systems while drawing from the French security court concepts by utilizing the existing FISA court for judicial authority and overview.
  3. Institute a full and permanent interagency integration of FBI counterterrorism agents with tier one Special Operations Command special mission units.
- A. **RECOMMENDATION 1: UNITY OF COMMAND—ESTABLISH NCTC AS THE COUNTERTERRORISM INTERAGENCY ORGANIZATION WITH AUTHORITY TO DEVELOP PLANS, ASSIGN TASKS, COORDINATE OPERATIONS AND DEVELOP DOCTRINE AND POLICY**

In Chapter I of this thesis, as presented in the problem statement, the National Counterterrorism Center (NCTC) through the Senior Inter-Agency Strategy Team (SIST) identified strategic impediments to meeting objectives as outlined in the National Implementation Plan for the War on Terrorism (NIP). One such identified obstacle is the lack of central leadership or permanent interagency structure that seeks to strategically facilitate the proper collection, handling, and disposition of classified intelligence information for use as evidence in the prosecution of terrorist subjects. Since 9/11 there has been significant effort to bring together all the disparate departments and agencies to more effectively apply all the elements of national power that exist in each respectively.

Nonetheless, as discussed in a December 2008 Congressional Research Service (CRS) report, the organizations and procedures in the national security community, still in use today, are steeped in an antiquated twentieth century bureaucratic framework where departments and agencies are fiercely protective of perceived proprietary turf and where fiscal allocation is appropriated by agency and not by functional area (Dale, Serafino, & Towell, 2008). The debate within the counterterrorism community regarding the adequacy of the current system and potential solutions to meet the twenty-first century unconventional threats is wide ranging. Operations in Iraq, Afghanistan, East

Africa, and the issues demonstrated in the case studies of this thesis reveal flaws in the U.S. government's ability develop and prioritize strategies within an integrated and coordinated framework. This missing integrated and coordinated framework negatively impacts the U.S. counterterrorism community's ability to effectively facilitate the unified execution of complex counterterrorism missions with common end game goals.

### **1. The Need to Modernize the Counterterrorism Structure**

A 2008 House Armed Services Committee Panel (HASC) report on protecting American security included “interagency coordination” as a primary area in need of modification (House Armed Services Committee [HASC], 2008a). Later that year, during full HASC hearings, ranking members called for modernizing the national security architecture so that it is prepared to meet the challenges of the twenty-first century threat environment (HASC, 2008b). These examples bolster the complaint that the counterterrorism community does not adequately coordinate the strategic planning or execution of counterterrorism operations. These results can leave undetected gaps in planning, wasted resources, duplication of effort, working at cross purposes and ultimately failure in execution. Historically, responsibility in mission specific areas has been assigned to a “lead agency” for coordinating the efforts of multiple agencies that are involved by serving a function or role. The lead agency may be permanent or temporary, and it may or may not be able to give direction and assign tasks to the other agencies (Dale, Serafino, & Towell, 2008).

In August 2004, the National Counterterrorism Center was created by executive order and later codified by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004. NCTC exists as an extra-agency entity constructed by providing personnel from key participating agencies including state and local authorities. The Director of NCTC reports directly to the President on the conduct of strategic operational planning for counterterrorism activities for integrating all elements of U.S. national power (Maguire, 2008). The Director also reports to the Director for National Intelligence as the primary organization in the U.S. government for analysis and integration of all terrorism intelligence (Best, 2010; NCTC, 2009).

The interagency concept of NCTC mirrors that of the incredible success demonstrated at the Joint Interagency Task Force SOUTH (JIATF-S). Over the course of 20 years, JIATF-S has built the consummate integrated network of law enforcement, intelligence, and military assets. Created with the focus to detect activities and interdict the shipments of narco-terrorist organizations, JIATF-S serves as the model for how to integrate and utilize all the assets of national power to effectively handle complex national policy issues, whether it is illegal drugs, weapons proliferation, or international terrorism. Trust and cohesion are built through a clear defined mission statement, goals and objectives and a unity of effort forged by the integration of key personnel from the various counterterrorism agencies (Yeatman, 2006).

An effective independent interagency body must promote a sustained environment in which the interagency personnel assigned possess a strong sense of ownership in the mission and the entity for which they work. For the alliance to be successful, the workforce must sever the umbilical cord to the workforce's respective parent organizations for the duration of their assignment. In order for the participating agencies and the workforce to buy-in, there must be the realistic expectation that the stand-alone agency has the authority and clout to act on its mission statement and achieve its goals and objectives. Absent the legal authority or hammer to compel the participating agencies to act on the plans it develops, the entity will remain a toothless tiger.

## **2. The NCTC Solution, the Concerns and the Possibilities**

The U.S. government has already expended great effort and a tremendous amount of resources to create an independent stand-alone agency that is comprised of personnel from the participating counterterrorism community. The mission statement for NCTC states:

Lead our nation's effort to combat terrorism at home and abroad by analyzing the threat, sharing that information with our partners, and integrating all instruments of national power to ensure unity of effort. (NCTC, 2009)

NCTC is mission specific, and its mission statement aligns precisely, "*integrating all instruments of national power to ensure unity of effort, [emphasis added]*" with what

needs to occur concerning counterterrorism strategy development, planning and mission execution (NCTC, 2009). All of the players are already in the McLean, Virginia Liberty Crossing complex, including the Central Intelligence Agency, Federal Bureau of Investigation, Department of Defense, Department of Justice, Department of Homeland Security, Department of Energy, and Department of State among others (NCTC, 2009). So what is missing? NCTC possess the foundation of the successful JIATF-S construct but as stated by FBI Executive Assistant Director Arthur Cummings, “the current legislation does not permit NCTC to task agencies and direct operations. NCTC can develop the plans but there currently is no mechanism that gives them the authority to put those plans into action” (Cummings, 2009). NCTC Deputy Director for Strategic Planning, Vice Admiral Joseph Maguire, confirmed this statement explaining that he has the power to task departments and agencies across the homeland security spectrum, 26 in all, but he cannot direct their actions to carry them out (Maguire, 2008). Maguire emphasized that getting these agencies to make decisions and execute what you are asking them to do, absent the authority, is to say the least, “a great challenge” (Maguire, 2008). Maguire articulated that the challenge stems from asking agencies, in some cases, to give up control of legacy missions and practices in order to execute broader strategic plans. In the territorial inter-agency environment, with so many different approaches and cultures, the resistance to change can be daunting (Maguire, 2008).

As with any new endeavor, strategy, or player to the game, concerns abound. Interviews with senior members of the counterterrorism community expressed reservations that NCTC is primarily an intelligence focused entity and does not inherently have the “results endgame mentality” critical to lead such a group. FBI Deputy Assistant Director James McJunkin expressed this same concern with the caveat that an experienced “operator” with the knowledge and track record of achieving endgame results would need to lead such an organization (McJunkin, 2009). McJunkin also expressed that there are still considerable turf battles and a reluctance to cooperate from some members of the counterterrorism community. Some, as former FBI Assistant Director Michael Heimbach, have expressed the concern regarding the NCTC Director’s

dual reporting requirements which includes reporting directly to the Director of National Intelligence on matters of counterterrorism intelligence analysis

The apprehension stems from placing the NCTC Director in a direct reporting chain, albeit not an operational one, that is unduly influenced by an intelligence community that is still struggling to fully understand what the other members of the counterterrorism community bring in terms of endgame options (Heimbach, 2009). Those such as Cummings, Heimbach and senior officials at the Department of Defense agree that such an interagency organization should be intelligence driven, but it does not have to be intelligence led. Most importantly, it must be an independent, standalone entity that will consider all options equally in achieving endgame results (Cummings, Heimbach, Cowhig, DoD Official, personal communication, August 3, 2009).

### **3. Modifying NCTC to Meet the Challenge**

For NCTC to become the central strategy planning and operations body that the counterterrorism community needs, the Director of NCTC must possess the power to task and direct the participating agencies. Going beyond this, NCTC should have the ability to review policy and procedures of all the counterterrorism community participants while evaluating the equities of everyone involved. Violations of the accepted policies and procedures must have consequences (McJunkin, 2009). The Director of NCTC must become a central player in the counterterrorism fight beyond just the coordination of intelligence analysis specific to terrorism.

The NCTC Director, who is appointed by the President and confirmed by the Senate, should be selected as an expert who is well versed in the interagency counterterrorism arena. Taking a page from the book of the DoD's Chairman of the Joint Chiefs of Staff, the head of NCTC should be rotated among principal participating agencies and serve a five-year minimum, 10-year maximum term, similar to the Director of the FBI, to avoid or mitigate any issues of political influence. The Director of NCTC, via his Director and Deputy Director for Strategic Planning and Operations, would be responsible for the national counterterrorism program with all the elements of national power available to achieve desired outcomes. As stated by Cummings, "trying to operate

by consensus always results in watered-down concepts and plans. Instead, we need to assign responsibility and hold agencies and people accountable. One guy in charge, utilizing everyone else's elements of national power....now that's purple" (Cummings, 2009).

In 2007, NCTC established the Senior Interagency Strategy Team (SIST) to serve as the forum to solicit interagency inputs, broker compromises and determine if agencies were able and willing to relinquish control of legacy missions or take on new responsibilities (Maguire, 2008). Since NCTC can serve as the foundation of the needed stand-alone counterterrorism body, the SIST can be the vital instrument where all the interagency capabilities and skills are marshaled to develop coordinated plans with end game results. One significant difference with the current SIST is that members representing each agency would be executive level (SES and Flag officer) personnel assigned as permanent staff to NCTC for a period not less than two years. This recommendation will maintain a level of consistency that will be less susceptible to changes brought on by new political administrations. It will also allow these executive leaders to take this high-level interagency experience back to their parent agencies as they prepare to ascend to higher levels of leadership and authority. The supporting staff requirements would also be met from interagency personnel for two to three years tours. These recommendations borrow directly from the successful JIATF-S model where buy in and a sense of ownership in the plans and operations has led to 20 years of seamless integration. With guidance provided by the Director of NCTC, the SIST, led by the Director and Deputy Director of Strategic Operations, will develop the national strategic counterterrorism plans and determine the requirements each agency will need in carrying out their assignments. At the conclusion of the process, once a fully coordinated strategic plan is in place, the Director of NCTC can then report to the President and the National Security Council for review and approval (Maguire, 2009).

A modified NCTC SIST can also be instrumental in creating interagency counterterrorism policy and doctrine that will shape and guide the U.S. counterterrorism operations going forward. As discussed in Chapter III, in response to the Christmas Day 2009 attempted bombing, President Obama directed NCTC to, "establish and resource

appropriately a process to prioritize and to pursue thoroughly and exhaustively terrorism threat threads, *to include the identification of appropriate follow up action by the intelligence, law enforcement, and homeland security communities* [emphasis added]” (White House, 2010). However, without the authority to direct the necessary follow up to terrorism threat streams, history shows that institutional inertia by the agencies in the counterterrorism community will make NCTC’s task daunting at the very least.

*a. Utilizing the DoD Reorganization Example*

The Goldwater-Nichols Defense Reorganization Act of 1986 brought sweeping changes to the U.S. military’s ability to organize, plan and execute its mission. It initiated significant changes to the command structure of the United States military by increasing the powers of the Chairman of the Joint Chiefs of Staff who now serves as the principal military adviser to the President and the National Security Council (NSC). The act also increased the ability of the Chairman to direct overall strategy and provided greater command authority to “unified” and “specified” field commanders (Pub L. 99–433). The success of this effort is exemplified in the accomplishments achieved in Operations Desert Storm, Enduring Freedom and Iraqi Freedom. The creation and application of similar legislation that bestows many of the same authorities to the Director of NCTC would be instrumental in advancing the counterterrorism community in the same manner.

Just as in Goldwater-Nichols, the counterterrorism community would participate in shared procurement. The Director of NCTC would control the purse strings for the allocation of funding and resources pertaining to the counterterrorism mission requirements as outlined in the joint plans develop by the SIST and approved by the President and NSC. This control of funding and resources would mitigate some of the competition between agencies while providing the NCTC Director with significant leverage to ensure interagency compliance with assigned tasks. While the Director of NCTC would be able to direct agencies operations to support the joint plans, he would not dictate or micromanage the agencies on how to carry out the operations. Just as the

Chairman of the Joint Chiefs does not apply command over the execution of military operations, the Director of NCTC would allow the respective agencies to execute their mission assignments.

#### **4. The Process for Making the NCTC Solution Happen**

To activate the process and create this modified counterterrorism megacommunity, will be the presence of strong leadership. When considering the vital nature of America's security and the number of different government agencies involved, the one position that possesses the power and weight to bring this process together is the Office of the President. The President must function in the role of a kingpin who provides direction and guides the process. Furthermore, the White House will draft and push the legislation required to grant NCTC the authority to exercise the "collaborative thuggery" needed to capitalize on the "spirit of collaboration" that already exists (Bryson, 2004).<sup>11</sup> Beneath the President, "champions" who share the vision to have a successful central strategic counterterrorism organization, will be necessary. Ideally, the champions will be the directors of the participating agencies who will bring their respective designees to shepherd the process through each respective organization.

Additionally, as described in Kim's *Blue Ocean Strategy*, it is important to recognize the need to identify the cohorts—those who will benefit and ally with the plan, and the scoundrels—those who perceive a loss of clout, funding or power and will oppose the plan if not sabotage it (Kim, 2005). The President must effectively communicate and demonstrate to the executive leadership of these organizations that the functional increased capacity each will gain within its organizational realms, that each will not be diminished but in fact will each play a greater role in coalescing the national counterterrorism strategy. It must also be communicated that counterterrorism

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<sup>11</sup> Based on the Theory of Collaborative Advantage (TOCA) the "Spirit of Collaboration" is the idea of involving, embracing and mobilizing participating agencies to attain common desired outcomes. It can be argued that a spirit of collaboration surely exists in the U.S. counterterrorism community (Bryson, 2004). TOCA also recognizes the reality of "Collaborative Inertia" brought about by self interest, cultural stubbornness and politics (Bryson). In order to achieve significant results worthy of the effort expended, there is the need for "Collaborative Thuggery" to overcome the individual agendas and politics each participant brings to the table (Bryson).

operational funding and resources will be allocated by NCTC based on function and responsibility and not by agency. Hence, the coordinated strategic plans developed at NCTC will have teeth to compel the agencies to execute their assigned tasks as outlined by the plans. Most importantly, the message must focus on accomplishing the shared goals and common strategic end game mission—that of protecting the nation from the modern day terrorism threat. By converting even just a few scoundrels into cohorts, a powerful stable of champions will emerge to counter the remaining detractors to the NCTC plan.

Kim also recommends identifying a consigliore, a highly respected insider who can advise of the pitfalls and likely difficulties in making the execution strategy work. The consigliore would also work to exert influence over the scoundrels in the equation by bringing them along in the process and giving them confidence that their concerns are heard and best accommodated. Retired Chairman of the Joint Chiefs of Staff Colin Powell and former FBI Director Louis Freeh are examples of the high-profile and well-respected individuals who would be accepted as competent and fair to all those involved. Considering the stakeholders involved, it would be wise to retain two consiglioires. One who would work within the counterterrorism community, while a second with considerable experience in the drafting and passage of security legislation could work on the legislative side. Suggestions for these positions could be former Congressman Lee Hamilton who co-chaired the 9/11 Commission and well-respected former Senator Fred Thompson.

The stakeholders must understand that the concept of a central counterterrorism authority at NCTC will enhance respective ability to meet their mission assignments while providing success in meeting the collective national goal. By creating a Joint Chiefs/JIATF-S entity to bring together all the elements of national power will increase the nation's ability to protect itself and mitigate the threat posed to it.

## **5. Pros and Cons of the NCTC Solution**

### **a. *Pros***

In order to effectively develop and implement cohesive strategic plans that seek a defined and agreed upon endgame result requires all participants to fully buy-in and possess ownership of the process as much as the outcome. This recommendation capitalizes on the existing NCTC foundation and structure that has already been heavily invested. Why reinvent the wheel and create yet another agency when NCTC already seeks to implement what the counterterrorism community needs. This recommendation utilizes the success exemplified in the JIATF-S model, with a 20-year track record to support its cause, and the changes made by the innovative Goldwater-Nichols Defense Reorganization Act as the basis for the modifications that need to be put into practice at NCTC.

Better coordination and planning among the interagency partners under the firm direction of an experienced director would facilitate the use of classified information as evidence because all the planning regarding the use of that information would be done on the front end and not after the fact. The battle of wills between the intelligence and law enforcement elements of community would be more effectively resolved at the start and would also permit the intelligence agencies to expect and prepare for a legal outcome of the operation. In addition, it will allow for better alignment of the resources and the selected elements of national power that will be put into play when targeting high value terrorism subjects.

As an example, had there been coordinated plan on how to deal with Jose Padilla, regardless of how or where he was captured, then his designation as an enemy combatant or the use of the ineffectually material witness warrant would not have been necessary. The same case can currently be made for terrorism subjects such as Adam Ghadan, Adnan El-Shukrajuma and even Usama Bin Laden. The development of different courses of action in pursuing an endgame strategy for each gives each interagency partner ample opportunity to prepare and execute their part of the plan. It

also gives the U.S. government more flexibility to execute operations depending on what circumstance may be present when the opportunity arises.

*b. Cons*

There will likely be strong institutional resistance from many of the interagency participants who will perceive a loss of autonomy and power. Unwilling participants will make the transition to a new structure challenging and even cumbersome in the beginning. There will be political resistance from congressional members and oversight committees who will jockey for position on the right to control the NCTC purse strings. Other committees and congressional members will lament any loss of power or control and seek to prevent such changes from affecting their positions. In addition, the current Director of NCTC Michael Leiter is unproven and will have to quickly demonstrate his capability to meet the challenge of leading a disparate interagency community with different mindsets and institutional inertia. The coordination and direction of counterterrorism operations will have to be reviewed to ensure the best courses of action are prepared and ready to be executed. This will require the inputs, concerns and requirements from all participants as well as the identification and assignment of SES level personnel from each agency, which may not be accomplished quickly.

**6. Summary Endgame Recommendation**

Utilize the heavily invested existing NCTC infrastructure as a standalone body to fully coordinate and integrate the strategic planning and mission execution of the counterterrorism community. Utilize the success demonstrated by the JIATF-S model by committing resources and senior ranking personnel for permanent assignment in key positions under the Director of NCTC. This will create a sense of ownership, increase trust and loosen the umbilical cord to parent organizations while integrating all capabilities of national power in an effective and efficient manner. Increase the authority of the NCTC Director in a similar manner that the Goldwater-Nichols Defense Reorganization Act of 1986 did for the Chairman of the Joint Chiefs of Staff. Increase

the ability of the NCTC Director to not only conduct joint strategic counterterrorism planning but also direct overall strategic operations by providing greater command authority to a unified counterterrorism interagency community. Provide the NCTC Director with control of funding and resource allocation pertaining to the mission requirements outlined in the strategic plans for each participating agency. The creation of this central counterterrorism organization will outline the strategic plans to destroy or disrupt terrorist organizations while developing specific courses of action targeting terrorist organizations and the key high value leaders and operatives. Through integrated planning, these coordinated courses of action will facilitate full integration of national assets and ensure that information obtained in the course of counterterrorism operations is collected, handled and preserved, from the outset, in a manner in which it can be used in a judicial prosecution tailored to Article III or Military Commission.

#### **B. RECOMMENDATION 2: INSTITUTE A LEGAL U.S. PREVENTATIVE DETENTION SYSTEM UTILIZING THE FISA COURT**

As discussed in previous chapter, the furious debate over the existence of the Guantanamo Bay prison and the disposition of the terrorist subjects housed there continues to rage. With some of the world's most dangerous terrorists in custody, extracting information that can lead to the pre-emption of attacks, the apprehension of other terrorist members and produce critical evidence is essential. As shown in the case study analysis, terrorist operatives such as Jose Padilla, Richard Reid and Farouk Abdul Mutallab must be exploited to meet the pre-emption priority. Their cases also demonstrated the requirement to have available the statements of other terror operatives who have also been exploited while in preventative detention in order to secure substantive convictions. The most recent cases of "Underwear Bomber" Farouk Abdul Mutallab<sup>12</sup> and the premature arrest of Najibullah Zazi<sup>13</sup> further strengthens the argument

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<sup>12</sup> Mutallab is a Nigerian Al Qaeda operative who attempted to blow up Northwest Flight 253 on December 25, 2009 by concealing an IED in his underwear (DeYoung & Fletcher, 2010).

<sup>13</sup> Zazi is a U.S. citizen who was arrested on September 19, 2009 for reportedly conspiring to carry out attacks against the New York City subway system. The arrest of Zazi and search warrants executed on September 20, 2009 were reportedly a result of deconfliction problems between federal authorities and local law enforcement (Sheehan, 2009).

of the need for the U.S. to have this counterterrorism tool in its tool box. In order to meet the criteria laid out by President Obama, the following recommendations will help achieve the endgame and answer the question of whether preventative detention can fit into the virtues of a free democratic society.

## **1. Dispelling the Misconception, a U.S. Preventative Detention System Is Possible**

As previously discussed in Chapter IV, one of the most misunderstood perceptions is that the U.S. Constitution prevents the government from arresting and detaining an individual for more than 48 hours before that person must be presented to a magistrate. The misperception is that in order for the government to hold a detained person for longer than 48 hours would require a change to the Constitution itself. However, analysis by Constitutional scholars, including renowned Professors John Yoo and Richard Posner, clearly show that the 48 hour rule was established through the interpretation of the Supreme Court pertaining to case law touching on the due process clauses in the Fourth, Fifth and Sixth Amendments. The analysis by Yoo and Posner show there is nothing explicitly stated in the Constitution that would prohibit a balanced preventative detention system so long as Congress passed legislation authorizing its existence.

## **2. Developing a Preventative Detention Framework That Meets Disruption, Intelligence Collection and Prosecution Requirements**

Scrutiny of the current U.S. response to this complex issue reveals a reliance on a patchwork of pre-9/11 laws that are ill designed to meet the modern day terrorist threat. These laws are geared for issues relating to material witnesses, immigration and enemy combatants in a traditional war between nations. This thesis espouses the need to develop a coherent legal architecture with adequate procedures to provide a tool for disruption and deal with the interaction of intelligence information and the judicial system. The next step is to construct a legal framework that will clearly lay out how it will meet the short-term requirements of disruption and intelligence collection but also meet the long-term endgame requirement of prosecution.

Drawing upon the British and Israeli models, the Brookings Institute's Benjamin Wittes and Heritage Foundation's James Carafano each provide an excellent outline as to what an American preventative detention system would resemble. Wittes's vision suggests the detention system would only be for non-criminal disruption purposes. Carafano strongly lays out the practical and tactical necessity of utilizing preventative detention to obtain critical intelligence information from the detainee. This thesis will bring together a practical and strong recommendation that fuses the elements of disruption, intelligence collection and prosecution. As discussed at length in Chapter IV, America's situation is not unique. The U.K. and Israel are among those who face similar terrorist threats and have developed legal preventative detention structures that permit the government to act upon intelligence information while also ensuring the existence of burden of proof standards, procedural protections and oversight (Carafano & Rosenzweig, 2004).

*a. The Wittes Preventative Detention Framework*

In a 2009 paper for the Brookings Institute, Wittes provides an excellent proposed preventative detention model. Wittes's model attempts to move away from the laws of war paradigm, which has governed the enemy combatant debate, so that the executive branch will maintain its exclusive legal privilege to detain those caught on the battlefield until hostilities are over. Wittes's model also seeks to provide the executive branch with an option to criminal detention should the evidence not be sufficient to charge a detainee immediately following his arrest. Under Wittes's plan, should the government seek the preventative detention option, it could, with certification of the Attorney General, arrest and hold a detainee for a maximum of 14 days before needing to notify and seek judicial authorization for further detention (Wittes, 2009). The 14-day period permits the government from publicly disclosing the arrest to allow for the apprehension of associates or to not expose operations that could be compromised by the news of the detainee's capture. Should the government wish to continue with detention beyond 14 days, it must petition the Federal District Court for the District of Columbia to issue a detention order under the authority that the model law grants. If the District Court

approves the government's petition, the court issues an order authorizing the detainee to be held for up to six months. This process may be repeated every six months until the government or the court determines that the detainee no longer meets the criteria established in the law or until the government transfers the individual for trial, release or to foreign custody (Wittes, 2009).

Under Wittes's model, those who could be subject to detention are non-U.S. persons who are identified to be (1) an agent of a foreign power, if (2) that power is one against which Congress has authorized the use of force, and if (3) the actions of the covered individual in his capacity as an agent of the foreign power poses a danger both to any person and to the interests of the United States. This precept borrows directly from Foreign Intelligence Surveillance Act (FISA), which delineates who is subject to authorized FISA court surveillance. The government, at this juncture, only needs to articulate a "reasonable suspicion" that an individual meets the above criteria. Upon the government petitioning the District Court for prolonged detention, the detainee is afforded counsel who is cleared to receive and handle classified information. The detainee at this juncture is also informed as to the reason for his detention and the ability to contest the detention before the court at the six-month mark. The burden of proof for the petition falls upon the government who may utilize hearsay evidence but must also adhere to discovery obligations to the cleared defense counsel as principally found in current habeas courts (Wittes, 2009).

*b. Recommendations for Modifying the Wittes Model*

(1). The system would include U.S. persons. While Wittes's model is a good framework from which to begin, there are critical missing elements. One element in Wittes's presentation is his model law that would only apply to non-U.S. persons, meaning those who are not considered U.S. citizens nor have permanent resident alien status. While Wittes's intention to restrict the preventative detention regime to foreign persons detained either overseas or on U.S. soil is assessed to be an attempt to

make it initially more palatable, the case of Jose Padilla, Najibullah Zazi or the potential future arrests of Adnan El Shukrajuma, Adam Ghadan and Abu Mansour Al-Amriki, all U.S. citizens, reveal a significant gap.

As presented in Chapter III, in the case of Padilla, intelligence obtained from the interrogation of other senior Al Qaeda detainees and documents recovered in Afghanistan clearly indicated Padilla, a U.S. citizen, had been tasked to return to the U.S. to carry out a catastrophic terror attack targeting civilians. His arrest and subsequent detention and interrogation, while controversial, revealed the full extent of the plot and significant intelligence on Al Qaeda and other members of the organization. In the case of Zazi, a substantial summary of media reports have indicated strong links to Al Qaeda, a sophisticated plot to attack the New York City subway system and that his arrest was premature due to unintended complications with local law enforcement activities (Baker, 2009). Assuming the U.S. is fortunate in executing the capture of El-Shukrajuma, Gadan and Abu Mansour, all U.S. citizens assessed to have significant contact with senior Al Qaeda leaders, the critical need to extract the intelligence they are believed to possess would be of the highest priority.

A good solution to filling this gap would be a more stringent set of criteria when dealing with the preventative detention of a U.S. person. Instead of needing only the Attorney General's certification to execute the arrest and initial detention, the case and intelligence information would need to be presented to Federal Judge for review and authorization. The individual must:

1. Determined to be an agent of a foreign power;
2. The foreign power is one in which Congress has authorized the use of force;
3. The actions of the individual in his capacity as an agent of the foreign power poses a danger both to any person and to the interests of the United States.

(2) The system must have emergency authorization capability. In the instance of an emergency situation in order to prevent an eminent attack, the government would follow the same procedure as it does in obtaining emergency FISA

authority whereby the Attorney General provides the emergency authorization but the case must be presented to the FISA court within 72 hours. In the case of an emergency preventative detention request, the requirement would be more stringent by forcing the government to go before the court in 48 hours. If the court denies the authorization due to lack of meeting the criteria previously outlined, the authority is immediately rescinded and the subject set free.

(3) The system would provide an initial 25-day detention period, six-month judicial review and a two-year limit. Wittes's model suggests a 14-day period of detention prior to notifying the court or the arrest being made public. However, as mentioned in Chapter II, typically the time needed to coordinate with interagency partners and foreign intelligence services regarding the use of classified information in any type of judicial setting can be very challenging. Furthermore, while Wittes suggests that his model would not be intended for the purpose of intelligence collection from the detainee, having a known terrorist in custody without soliciting the details of potential attacks would be unpardonable.

Extending the initial detention period from 14 days to 25 days would provide the government with valuable added time to coordinate the facilitation of such classified information to perhaps bolster its case for authorized detention. Additionally, it is recommended that the model law bring the review of the court in from the start so that absent an emergency situation, judicial inclusion and oversight is present from the beginning. The 25-day period would be reasonable by falling in-between the U.K. and Israeli models and the notification of a cleared defense counsel can still be maintained at the 14- or 15-day mark so that counsel can have roughly 10 days to review the discoverable information prior to meeting with his client. The 25-day window would also provide the government a reasonable, though not ideal, amount of time to conduct focused interrogation of the detainee without outside influence or distraction. The statements made by the detainee during this 25-day period prior to meeting with his cleared counsel would not be admissible in a criminal court unless the detainee agrees to waive his Miranda rights.

As demonstrated in Chapter III, Richard Reid agreed to waive his Miranda rights and valuable intelligence was obtained by the FBI prior to Reid's initial appearance in court roughly 36 hours later. If the detainee refuses to waive his rights, he can still be interrogated for intelligence purposes but admissible statements will need to be captured via a "clean team" for his prosecution. A "clean team"<sup>14</sup> will need to duplicate or obtain the same incriminating statements from the detainee but without having the knowledge benefit of the interrogation results obtained during the intelligence-gathering phase. However, any incriminating statements regarding other terrorism subjects can be utilized in their potential future prosecutions. For the purpose of maintaining the prosecutive endgame, the interrogation techniques utilized that result in incriminating statements from the detainee would be limited to those authorized for law enforcement purposes.

If the government chooses to maintain the subject in preventative detention beyond 25 days, the government must: 1) make the subject's arrest public; 2) return to the court every six months for judicial review and approval to extend the detention. At the two-year mark, the government must formally charge the subject, transfer him to a country with pending charges, or release him. If the subject is found guilty in a judicial proceeding, the amount of time in preventative detention will count as time served against his imposed sentence.

(4) The system would utilize the FISA Court. Finally, while Witles places the Federal District Court in Washington D.C. as the situate for such a regime, the anticipated heavy use of classified information makes the modification and use of the already existing FISA court a much more suitable venue. The FISA court already has a cadre of congressionally approved judges who are cleared to handle the most sensitive and highly classified information and are well versed in the above-

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<sup>14</sup> The term "Clean Team" refers to a team of law enforcement agents, typically FBI agents, who will engage with a detained terrorism subject only at the conclusion of the interrogation of the detained subject for intelligence collection purposes. A Clean Team would be used when the detained subject originally refuses to waive his Miranda rights but his interrogation proceeds in an effort to collect intelligence information. The Clean Team is not privy to the information or results of the intelligence interrogation of the subject and in essence must attempt to have the subject re-confess his statements assuming the detained subject agrees to waive his Miranda rights the second time afforded the opportunity (Suro, 1999).

mentioned precepts that are used to authorize FISA authority. Utilizing an already existing legislatively authorized court, specifically built to protect U.S. national security, would go a long way to gaining acceptance with Congress and the American public. As presented in Chapter IV, the French counterterrorism court is a similar national security venue to the U.S. FISA court and can be used as a model to further develop existing FISA court for the purposes of preventative detention. While certainly different in their legal construct and approach, the French have successfully demonstrated that the concept of a national security court, possessing a cadre of cleared judges, prosecutors and defense attorneys permits for a much tighter fusion between intelligence, evidence and judicial due process that is highly effective and capable of protecting classified information while not jeopardizing criminal prosecution (Shapiro & Suzan, 2003). The FISA court is well situated in Washington D.C. where the intelligence and federal law enforcement components of the counterterrorism community have quick access.

The court will need to develop a cadre of cleared defense counsel, which can be raised from both the public and private ranks. Those from the public ranks can come from within the Justice Department similar to a public defender's office. Private attorneys who are willing to submit to the requisite background investigations to obtain Top Secret clearances would be able to make their services available to detained subjects. A detained subject may also choose a cleared private counsel if the subject rejects the government's offer of free legal counsel.

(5) The system could implement a "cleared Grand Jury" concept. Since the proposition of a U.S. preventative detention system would be unique and perhaps contentious to the American mindset, then conceivably removing the initial preventative detention ruling by just one FISA court judge would be more acceptable. An alternative consideration could be in seating a "cleared Grand Jury" for preventative detention cases heard within the FISA court. The concept lends to removing the initial decision from the hands of just one person to a larger pool of cleared citizens that could hear the evidence against a subject vice a single judge. Once presented with the evidence, both classified and unclassified, should the "cleared Grand Jury" hand down a preventative detention order, much like a Grand Jury indictment, the government would

be authorized to detain the subject in question. The FISA court judge would preside over the initial “cleared Grand Jury” process and would have the authority to review and grant additional periods of requested detention by the government. A cleared jury pool to hear such cases can be drawn from the existing 3 million individuals who already maintain security clearances (Government Accountability Office [GAO], 2009).

These cleared individuals would be subject to “jury duty” as a condition and privilege of being granted such a clearance by the government. The expected argument from critics would be that the jury is partial to the government due to the security clearance granted by the government. However, one only needs to consider the hundreds of thousands of individuals within a multitude of departments, state and local agencies in addition to the thousands of contractors who work for private organizations to understand the diversity such a jury pool would offer. It can be effectively argued that a jury pool of three million persons from around the country, in many respects, is considerably greater and more diverse than most local jurisdictions in selecting a jury for criminal trials.

(6) The system will have a five-year sunset clause and regular congressional review. Wittes is correct to recommend the requirement that the law contain a periodic sunset provision that will require Congress to evaluate the regime to determine if it needs to be modified, enhanced or is no longer needed. Wittes suggests a three year review period; however, due to the fact locating and apprehending terrorist subjects is very difficult, an initial 5 year review will provide for a better opportunity to see the regime put into practice. This sunset and evaluation concept is the same as has been done with the USA PATRIOT Act

### **3. The Process for Making the U.S. Preventative Detention System Happen**

A vital and critical step would be to garner bipartisan support for such a modification to the American legal system. The executive branch, led by the Attorney General, should recommend to the President the creation of a bi-partisan panel of former legislative, executive and judicial branch officials to study the proposed

recommendations presented below. The panel should resemble the highly respected and effective 9/11 Commission model. While the leading House and Senate officials for both parties from the Judiciary Committees should be participants to provide current congressional input, the purpose of having the majority of the committee not be sitting members is to de-politicize the process as much as possible so that careful and objective consideration can be accomplished. This same technique was successful in providing effective and well-accepted recommendations to both the executive and legislative branches. Though sitting members of the bench should not participate so as to not give the impression of creating law, retired members of the federal bench and respected constitutional scholars can provide expert judicial input. This scenario is more likely to gain the confidence of the American public when the debate within the nation takes place.

#### **4. Pros and Cons of a Legal U.S. Preventative Detention System**

##### **a. Pros**

The greatest benefit of establishing a legal preventative detention system would be the addition of a powerful counterterrorism tool in protecting the American public from terrorist attack by disrupting plots prior to their execution. It also incapacitates terrorist subjects so they cannot return to the battlefield and pose a risk to society. This system provides counterterrorism officials with the opportunity to extract critical intelligence from terrorist subjects to additionally identify other members, their plots and develop operations in order to neutralize their efforts. This system creates the opportunity to develop evidence for the prosecution of terrorism subjects so they meet justice and are no longer a threat to the nation. This construct provides for a fair and reasonable means of preventative detention that includes rigorous oversight, participation by all three branches of government and the American public. This system does not require a change to the U.S. Constitution and lies within the power of the legislative process to become law. The inclusion of the sunset/evaluation clause forces the system to be examined by the lawmaking body and places its continued existence directly in its power.

*b. Cons*

The objection to a U.S. preventative detention system will be its departure from accepted norm created by the Supreme Court's interpretation of the due process clauses within Fourth, Fifth and Sixth Amendments. Overcoming the objections of those who believe in a perceived constitutional right will be challenging. The use of the FISA court, while advantageous based on its history, is still unproven in this context, which raises concerns as to its viability. The creation of a cadre of cleared defense counsel will be time consuming and challenging as well as the consideration that an expansion of FISA court may also be necessary. The issue of where detained terrorism subjects will be physically held must be addressed, since the overseas arrest of non-U.S. persons can create issues relating to immigration and requests for asylum by those individuals. The means by which potential cleared Grand Jury members are summonsed and selected must be determined.

**5. Summary Endgame Recommendation**

This recommendation meets all the critical criteria of:

1. preventing attacks through disruption and incapacitation;
2. providing a platform for the collection of actionable intelligence while;
3. establishing a legal detention system that will allow for the intelligence collected from a subject in detention to be available as evidence for prosecution purposes.

The construct of a U.S. preventative detention system would allow for an initial unpublicized 25-day detention period by authorization of the Attorney General for non-U.S. persons while FISA court approval, perhaps via a cleared Grand Jury process, would be necessary for U.S. persons. The government would be able to question the subject during the initial 25-day period to gain actionable intelligence, obtain evidence by advising of Miranda or pitch the subject to become a source for the U.S. government. At the conclusion of the initial 25-day period, if the subject is maintained in custody his arrest will be publicized. Any subject held in detention beyond 25 days would have his

case reviewed by the FISA court every six months not to go beyond two years at which time the government would have to either formally charge the subject, render him to a country that is in a position to prosecute or release him. A cleared defense counsel would be provided discovery at the 15-day mark. Cleared defense counsel would be permitted to meet with the subject on the twenty-sixth day and represent his client at all future hearings before the FISA court regarding additional periods of detention. If tried and convicted in Federal Article III criminal court or Military Commission any sentence imposed on a guilty subject would have his time in preventative detention mitigated from that sentence. The preventative detention system would be subject to a five-year sunset clause for the debate to begin anew as to the system's continued usefulness or needed modifications.

In August 2009, National Security Advisor John Brennan declared a change in the terminology to adequately depict the threat facing the U.S. (White House, 2009). No longer termed the Global War on Terror, Brennan announced the effort would more specifically be addressed as the Global War on Al Qaeda (White House, 2009). While this change perhaps provides a better definition and focus, the accepted reality is that the threat posed by Al Qaeda and likeminded groups will continue for some time into the future. If the U.S. is to effectively protect its citizens and national interests while firmly remaining within its celebrated values of due process, transparency and balance of power, then a legal preventive detention system based on the framework outlined above must be considered. The President and Congress must engage the American people in the debate and present what an acceptable regime would entail. Only through the acceptance by the American public will such an endeavor be successful. In order to gain the acceptance of the American public, the President must lead by inviting congressional leaders in calling for and establishing a bi-partisan 9/11 style committee to develop the final constructs of a legal preventative detention system. The committee should also be provided with a proposed model of what the legal construct would look like and clearly outline what requirements it must meet to be effective. This recommendation provides that model.

## **C. RECOMMENDATION 3: FULL INTERAGENCY INTEGRATION OF FBI AND SOCOM**

The opportunities for the prosecution of foreign terrorism subjects are increasing. Captured terrorist operatives recovered from the battlefield, ungoverned lawless areas and foreign countries are rightfully seen as a potential wealth of actionable intelligence. However, as presented in Chapter III, much of the best and most accurate intelligence information is often precluded from use in the existing U.S. Federal Article III criminal justice system. This occurs due to the sensitivity of how the intelligence information is obtained but is also based on current judicial procedure and rules of evidence (Mukasey, 2007). This third recommended action identifies a means by which U.S. counterterrorism community can capitalize on an existing proof of concept to better integrate inherent capabilities and elements of national power. Enacting this third recommendation will facilitate gaining actionable intelligence while mitigating, to the greatest extent possible, the exclusion of that same information as prosecutive evidence.

### **1. Threats of Purpose, Threats of Context and National Strategy Objectives**

In a June 2009 report for the Center for Strategic and International Studies (CSIS), Nathan Freier discusses the challenge the U.S. faces with present and future security environments that will be dominated by defense-relevant “unconventional” threats, but which also lay outside of traditional warfighting boundaries (Freier, 2009). Freier assesses the unconventional challenges will be a hybrid threat comprised of “threats of purpose” and “threats of context.”<sup>15</sup> These continually morphing, unconventional, hybrid threats place limits on the use of traditional military power, and force the development and use of alternatives to fill the gaps in non-military capacity. Freier discusses how threats of purpose (terrorist groups) have conjoined and taken advantage of threats of context (ungoverned/under-governed sanctuary) to create the complex security environment with which the U.S. must contend. The present and future

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<sup>15</sup> Freier (2009) defines “threats of purpose” as those that emanate from state or quasi-state actors, while “threats of context” are those arising unguided from the environment itself (i.e., failed states or ungoverned areas).

security environment requires a strategic approach that will blend military and non-military capabilities. While the new security environment and the hybrid threats it presents will continue to require a substantial military role, the U.S. must employ a variety of effective counterterrorism tools in response (Freier, 2009). In essence, hybrid unconventional threats require a hybrid unconventional response.

Freier's supposition aligns with assumptions two and three outlined in Chapter I. Strategically, the U.S. has come to recognize the need for greater integration of capabilities and the roles assigned to meet the unconventional hybrid threats. This is buoyed by the creation of NCTC, which is responsible for the strategic operational counterterrorism planning that seeks to integrate all elements of national power. This planning is manifested in the National Implementation Plan for the War on Terror (NIP). As previously stated, the focus of the NIP is to eliminate overlap, set priorities and better balance the nation's counterterrorism strategy by infusing the military approach with law enforcement and diplomacy campaigns, which are seen as critical to long-term success. Within half a dozen broad objectives and more focused sub-objectives, the NIP designates lead and subordinate agencies to carry out a number of counterterrorism tasks (DeYoung, 2006). Among them are:

1. Maintaining the capacity to execute military operations wherever necessary to deter terrorists from attacking the homeland or to intercept and defeat terrorist threats at a safe distance from U.S. borders;
2. Terrorist threats and plans are detected and neutralized by penetrating and dismantling their networks through the integration of intelligence and law enforcement investigations;
3. Prompt law enforcement action against the perpetrators of terrorist actions through the integration of all pertinent resources for prompt identification and apprehension. (NIP, 2004)

The 2006 Department of Defense (DoD) National Military Strategic Plan for the War on Terrorism (NMSP/WOT) aligns and supports the objectives outlined by NCTC in the NIP. Produced through the Office of Chairman of the Joint Chiefs of Staff, the NMSP/WOT seeks to:

1. thwart or defeat terrorist actions against the U.S. and its allies,
2. attack and disrupt international terrorist networks abroad,
3. deny terrorists access to weapons of mass destruction,
4. combat terrorism and deny terrorists safe havens (NMSP/WOT, 2006) The NMSP/WOT recognizes that the U.S. can only succeed in its fight to protect the homeland and defeat terrorist threats through cooperation with other U.S. government agencies to include integrating inherent interagency capabilities (NMSP/WOT, 2006).

The NCTC and NMSP/WOT objectives, coupled with Freier's discussion of the hybrid threats posed in the modern day security environment, require an innovative strategy to meet those threats and provide long-term "end game" solutions. As presented in assumption two and supported by Freier, terrorist organizations such as Al Qaeda (threats of purpose) will continue to seek and utilize ungoverned areas (threats of context) such as the areas in Afghanistan, the Federally Administered Tribal Areas (FATA) of Pakistan or East Africa in Somalia. The pursuit of the most senior and significant terrorist actors will be a priority of the U.S. counterterrorism strategy. When the U.S. intelligence community is successful in locating these terrorist operatives, the decision to utilize U.S. military assets is almost exclusively the purview of the special operations units (SOUs) of the U.S. Special Operations Command (SOCOM) to execute the capture/kill mission.

These top tier SOCOM units have carried out these high level and sensitive missions throughout the War on Terror (GlobalSecurity, 2009). The September 2009 elimination of senior Al Qaeda and Al Shabaab leader Saleh Ali Nabhan, utilizing SOCOM forces, perfectly encapsulates all of the points discussed above (Fishel, 2009; Gettleman & Schmitt, 2009). Shortly following the invasion into Afghanistan, law enforcement capabilities were brought to the battlefield by having FBI special agents integrate, on a limited basis, with SOMCOM SOUs (Southworth & Tanner, 2002). Expanding the existing ad hoc relationship by fully and permanently integrating FBI expertise into the SOCOM mission set will further assist in meeting the NIP and NMSP/WOT objectives by creating a hybrid unconventional solution to Freier's complex unconventional security environment.

## **2. Bringing the Law Enforcement Capability to the Special Operations Mission**

The recommendation presented in this thesis is a departure from the temporary or ad hoc basis of FBI integration with SOCOM SOUs. The FBI and SOCOM each have maintained liaison positions (LNOs) at their respective headquarters since following 9/11 (Bald, 2005). The FBI has also embedded personnel with military units in Afghanistan and Iraq but has currently done so on an ad hoc basis (Mueller, 2007). The permanent integration of FBI special agents within SOCOM SOUs will provide an inherent professional expertise in the execution of Sensitive Site Exploitation (SSE), Battlefield Interrogation (BIT),<sup>16</sup> biometrics collection and follow-on long-term interrogation. It will also provide “legal and judicial” cover concerning establishing a chain-of-custody for the handling of potential evidence, acting as a possible arresting or seizing agent on the target and providing a testimonial capability in a courtroom.

The manner of effectively coordinating the integration of FBI agents into SOCOM SOUs is a key factor to making this collaborative relationship successful. During an interview in July 2009, Captain Wyman Howard,<sup>17</sup> a 20-year Naval Special Operations Officer, lauded the skill and professional expertise the FBI has brought to the special operations community. Howard commented on the need for a national level commitment from both the FBI and the Department of Defense, in the form of a formal memorandum of agreement (MOA) that will bind the organizations to a fully integrated process (Howard, 2009).

It is widely known that the selection and vetting process for U.S. special operations personnel is highly demanding and rigorous. This is due to the dangerous nature and importance of their mission assignments. In this regard, the FBI and SOCOM

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<sup>16</sup> Sensitive Site Exploitation (SSE): A related series of activities inside a captured sensitive site to exploit personnel, documents, electronic data, and other material located at the site, while neutralizing any threat posed by the occupants of the site or its contents (Vandal, 2005). Battlefield Interrogation (BIT), the process of questioning a detainee of a military operation typically following the completion of hostile actions (Vandal). Very similar to questioning an arrested criminal subject following a law enforcement action (Vandal).

<sup>17</sup> The views expressed by CAPT Howard are his own and do not represent the Office of the Secretary of Defence nor Special Operations Command.

will need to collaborate on the specific operational requirements SOCOM SOUs need from the FBI agents entering its ranks. The organizations will need to establish selection criteria and a vetting process to ensure that the agents who will become part of the special operations package can meet the physical, mental and emotional expectations of these highly discriminating military units. Coordination at the headquarters level utilizing the current FBI LNO assigned to SOCOMHQ and the SOCOM LNO assigned to the FBI Headquarters' Counterterrorism Division can facilitate this aspect of the endeavor.

*a. Getting the Right Personnel in the Right Places*

The next step would be to create and assign permanent GS-14 level FBI LNO's to each of the SOCOM component commands for a three-year assignment. These FBI LNOs would work in coordination with the LNOs assigned to each respective headquarters and the selected agents coming in from the FBI field divisions. The FBI LNOs would be responsible for and able to effectively coordinate the flow of FBI agents coming to the SOCOM component commands for two-year assignments. The two-year assignment period will permit agents assigned to an SOU to remain with his SOU for a complete training cycle and overseas deployment. By having the agents fully integrate and participate in the training cycle, the SOU personnel and the agents gain the benefit of training together, establishing standard operating procedures as well as roles and responsibilities prior to entering the battle space. The LNOs principal focus would be to work daily with their respective component command's training and operations departments and each of the SOUs to provide direct communication with the FBI agents who have been screened and selected to train and deploy with that particular SOU. As opposed to the LNOs at the headquarters' level, the FBI LNOs at the SOCOM component commands would have full visibility on current updates or changes to the training cycle, new capability and skill set requirements, and the ability to conduct quality control on the assigned agents while providing a direct line of communication for the commanding officer and senior FBI counterterrorism officials.

### **3. Pros and Cons of Full FBI and SOCOM Interagency Integration**

#### *a. Pros*

The full integration of a law enforcement counterterrorism capability to the Special Operations community will meaningfully move the bar of prosecutive success in the right direction. The ability of federal agents who can act as the collectors of damning evidence in addition to insulating SOU operators from having to testify bolsters the government's ability to prosecute high value detainees like those held in Guantanamo Bay. Office of Military Commission prosecutor Major Dan Cowhig strongly advocates for the entry of a federal law enforcement capability as early in the process as can be facilitated (Cowhig, 2009). Regarding the concept of fully integrating FBI agents with specialized military and intelligence units, Cowhig (2009) stated, "It would result in faster recognition of critical information and a greater accountability, organization and appreciation of physical evidence." Cowhig also felt participation of FBI provides for a better and cleaner testimonial capability (Cowhig, 2009). Echoing Cowhig is Department of Justice senior litigation counsel John DePue.

During an August 2009 interview, DePue stated that in terrorism cases the constitutional mandates that apply to material evidence are not so much attached to the material itself but to the manner the material is acquired (DePue, 2009). According to DePue, the national security methods on how potential evidentiary material is acquired must be protected and that the full integration of FBI with special operations is a good solution (DePue, 2009). By involving law enforcement at the front end of the operation there is a means to authenticate and testify to information from the outset without the need to re-create it after the fact (DePue, 2009).

This multi-disciplinary incorporation utilizes the "whole of government approach" to strengthen the U.S. government's ability to protect the homeland while serving to meet the objectives outlined in the NIP and NMSP/WOT. It accomplishes these tasks through enhanced intelligence sharing and immediate access to information by the lead domestic counterterrorism agency, the FBI, to identify and disrupt threats directed at the U.S. homeland. This recommended step will provide the U.S.

government's premier terrorist hunters with a superior law enforcement, interrogation and evidence recovery capability. It will increase the effectiveness and efficiency of U.S. counterterrorism missions by mitigating the potential loss of intelligence recovered during missions for use as evidence in follow-on judicial process.

FBI agents, who are in a position to testify and can protect the identity of special forces operators, can better provide accountability in the process for the recovery of material discovered on targets and elicit information from captured subjects based on a century of experience. FBI agents are also the only U.S. government officials who possess the unique capability of being both certified intelligence officers (Baginski, 2004) and sworn federal law enforcement officers. This combination places them in an exceptional position to seek, collect, analyze and disseminate critical information to the intelligence community but also handle that same information in a manner suitable for use in a court of law. By having permanent FBI LNOs at the SOCOM component commands, the Special Operations Community will gain greater confidence in the personal nature, mental, tactical and physical capability of the FBI agents who will become a part of the special operations package. Furthermore, the LNOs and SOUs will be able to train and conduct quality control during the training preparation period prior to deploying overseas to hostile environments.

*b. Cons*

A potential negative impact could be in regards to personnel resourcing. The FBI is already experiencing a deficit of agents in trying to manage the national security mission in addition to the recent spike in white-collar crime associated with the failed mortgage crises (GAO, 2004; Pistole, 2009). While the number of candidates seeking to fill the LNO and agent positions within the SOUs is expected to be robust, the concern revolves around attracting the right candidates who are qualified to meet the mission requirements. There is also expected to be some debate and criticism, potentially in the political arena, that federal law enforcement agents are not trained or suited to operate with SOCOM special operations units. A rebuttal to such a critique is that the FBI can draw on a sizeable number of agent personnel with extensive military

experience, many coming from the special operations community prior to coming to the FBI. Furthermore, the FBI can draw on its trained cadre of field division SWAT agents and members of its national Hostage Rescue Team for personnel who have an inherent tactical, physical and mental constitution for just such type of work.

Ultimately, this proposal seeks to eliminate just such a concern by having FBI counterterrorism agents screened, selected and trained to work alongside their SOCOM counterparts. Additionally, there may be criticism that the aggressive military approach that has demonstrated an incredible amount of success will be altered and slowed to fit a more methodical law enforcement scheme. Many media commentators and political hacks have cried foul to indications that captured overseas terrorist subjects would be read Miranda warnings. However, the intent of this recommendation is not to turn highly trained U.S. military special operations units into a law enforcement SWAT team on steroids but to enhance the special operations mission skill set and bring the law enforcement component to the front end of the counterterrorism mission. Finally, as with any increase or reallocation of personnel resources, there will be the need for increased funding. However, considering the counterterrorism mission is considered the top priority in the national security portfolio, a funding increase involving not more than 25 agents per annum would be considered negligible.

#### **4. Summary Endgame Recommendation**

Create permanent FBI LNO positions at the SOCOM component combatant commands. Select and detail these LNOs for a three-year assignment. Establish through collaborative effort, SOCOM and FBI operational requirements for FBI agents that will be assigned to SOCOM special operations units. Establish a selection and vetting process for FBI agents to be selected and assigned to SOCOM special operations units. Select and assign an initial contingent of eight FBI special agents for a two-year period to SOCOM SOUs and integrate them into the training cycle for preparation to deploy overseas with their assigned SOU.

This recommendation will help to address the NIP impediment outlined in Chapter I by establishing a permanent FBI counterterrorism law enforcement expertise

that will be fully integrated with tier-one SOCOM combat components during high-value missions. This will provide the U.S. government's premier terrorist hunters with a superior law enforcement, interrogation, evidence recovery, and testimonial capability while capitalizing on the synergy and effectiveness of the proven FBI and SOCOM relationship. This recommendation will accelerate the transfer of vital intelligence information that indicates threats against the homeland to the lead U.S. domestic counterterrorism agency. It will increase the effectiveness and efficiency of U.S. counterterrorism missions by mitigating the potential loss of intelligence recovered during missions for use as evidence during ensuing judicial process. This recommendation allows for the law enforcement end game option to be built at the front end of mission and run parallel to the intelligence part of the mission, eliminating the need to rebuild a case from scratch after the fact. Failure to address this issue could result in terrorist operatives being released and returning to the fight.

#### **D. SUMMARY**

The three recommendations presented in this chapter, 1) Establishing NCTC as a standalone counterterrorism organization with the power to plan and direct operations; 2) Establishing a legal U.S. preventative detention system and; 3) Fully and permanently integrating FBI and SOCOM, address the problem statement of this thesis by providing central leadership and a permanent interagency structure that strategically facilitates the proper collection, handling and disposition of classified intelligence information for use as evidence in the prosecution of terrorist subjects. These recommendations also provide solutions to the gaps identified in the case studies of prosecuting terrorist subjects in Federal Article III criminal court. These recommendations support the strategic objectives outlined in both the NIP and NMSP/WOT and provide unconventional hybrid solutions to the unconventional hybrid threats the nation faces.

1. The first recommendation establishes a permanent central coordinating body and interagency structure that can strategically facilitate the proper collection, handling and disposition of classified intelligence information for use as evidence in the prosecution of terrorist subjects.

2. The second recommendation meets the challenges of the modern day terrorism threat by working within the seams of the intelligence, law enforcement and military schemes to prevent and disrupt attacks, collect intelligence and facilitate prosecution.
3. The third recommendation brings together two elements of national power, federal law enforcement and military special operations, by integrating the inherent capabilities of two counterterrorism agencies, which will facilitate the collection and use of intelligence information as evidence for prosecution purposes.

These recommendations include a comprehensive process for enacting each along with supporting observations, statements and commentary from subject matter experts to the principals each recommendation supports. This thesis brings together practical and strong recommendations that fuse the essential elements of disruption, intelligence and prosecution. The final chapter of this thesis will encapsulate its conclusions and the consequences of not following through with the bold and aggressive moves outlined to protect the nation and ensure the end game.

## **VI. CONCLUSION, CONSEQUENCES, AND QUESTIONS**

The issues discussed in this thesis are complex and considerable. The issues range from the increased threat posed by international terrorism, military versus civilian jurisprudence, intelligence versus evidence and security versus freedoms. A variety of factors such as perceived legal impossibilities, outdated government organization, agency protection of turf and legacy missions along with institutional resistance to change absent a crisis makes addressing the issues neither comfortable nor easy. This thesis made four initial assumptions:

1. The U.S. priority in confronting the terrorism conundrum will be to prevent attacks against the homeland, allies and overseas interests;
2. Terrorist organizations such as Al Qaeda will continue to seek and utilize lawless, ungoverned areas such as the FATA, East Africa/Somalia or Trans Sahara Africa to train, plan and execute attacks;
3. As the battlefield and political landscapes continuously morph, the means by which the apprehension and disposition of terrorist operatives will also need to constantly adjust. This assumption underscores the credence that approaching terrorism from solely a military, intelligence or law enforcement angle will ultimately be ineffective and result in further deadly attacks;
4. The U.S. will continuously seek to impose the greatest and most substantial punishment, permitted by law, regarding the ultimate disposition of captured terrorist subjects. The most important of these assumptions states that the first priority of the government and the counterterrorism community is to prevent the execution of terrorist attacks against the homeland. This thesis has focused on ways to meet that priority while also resolving the problem of classified intelligence information being excluded for use as evidence in gaining the most substantive conviction possible against terrorist subjects. The research, case studies, interviews and analysis conducted in this thesis have resulted in bold recommendations that, while not simple, are absolutely viable and supported with evidence that they will be effective. This chapter will summarize the new situational dynamics of the terrorism threat facing the nation and the problem it has created in both protecting the nation while seeking fitting justice. Finally, this chapter provides a summary of the recommended solutions, outlined in detail in Chapter V, to resolve those problems and poses unresolved questions outside the scope of this thesis.

## A. THE STATE OF PLAY

The advent of modern day terrorism, often associated with the 1972 Munich Olympics Israeli massacre, brought forth an evolution in the motivations, the mode of attacks and the means by which those attacks are carried out. These successive events:

- 1983 bombing of the Marine Barracks in Beirut
- 1993 World Trade Center attack
- 1998 bombings of the U.S. Embassies in Kenya and Tanzania
- 2000 attack on USS Cole
- 2001 9/11 attacks
- 2002 Bali bombing
- 2005 London train bombings and
- 2008 Mumbai attacks

clearly demonstrate the evolution and changes in the international threat environment. The use of modern technology, such as high quality instantaneous worldwide communication, e-currency funds transfer, increasing access to previously unavailable information and contemporary international transportation, has made these quasi-national terrorist groups more threatening and difficult to deal with than at any point in U.S. history. Throughout the nation's 233 years of existence, it has, on one hand, successfully fought and won military campaigns, while also executing an incredibly effective transparent system of criminal justice.

The nation must contend with well organized, proficient, motivated and financed groups, operating from lawless regions (e.g., FATA region of Pakistan), failed nation states (e.g., Somalia) and semi-governed countries (i.e., Afghanistan, Yemen) that severely threaten the national and homeland security of the United States. As stated by Virginia Commonwealth University political professor Dr. William Newman:

no longer are nation-states the only entities that have the power and purpose to challenge the U.S. role as a global authority. The capacity and

motivation of non-state actors, such as Al Qaeda, to wreak havoc with mass casualties and enormous economic destruction in the pursuit of their political goals has revealed that pursuing an end game falls somewhere in between a military solution and criminal justice. (2002)

The response is to be proactive, get ahead of the enemy, and adopt an approach and capabilities to meet the evolving threat. This thesis has demonstrated that the threat and complexities of modern day terrorism require solutions that integrate key elements of national power in order to fill in the seams where these now threats exist.

## **B. THE PROBLEM**

In 2008, the NCTC SIST identified strategic impediments to meeting objectives outlined in the National Implementation Plan for the War on Terrorism (NIP). One identified impediment is the lack of central leadership or permanent interagency structure to strategically facilitate the use of classified intelligence information as evidence in the prosecution of terrorist subjects. In this regard, this thesis examined the question of whether Federal Article III criminal courts are up to the task to effectively deal with the modern day terrorism threat. The case studies and analysis presented in this thesis demonstrated dangerous holes and gaps that exist in the Federal Article III criminal process to meet the requirements of: 1) preventing terrorist attacks and; 2) ensuring substantive judicial convictions.

## **C. THE RECOMMENDATIONS TO MEET THE THREAT**

The modern-day terrorism threat is complex and growing in severity as more destructive capabilities become available to those who mean to do the nation harm. As stated above, the issue is not solely one of military, law enforcement, intelligence or diplomacy. It is a predicament that lies within the seams of these disciplines requiring an integrated approach of national capabilities. It is a dilemma that requires “out-of-the box” solutions and a break in traditional thinking. The three recommendations made in this thesis are non-traditional, distinctive but feasible. Most importantly, these recommendations focus on meeting the priority of preventing terrorist attacks while

ensuring a judicial end game for captured terrorist subjects. The strong and practical recommendations presented in this thesis fuse the essential elements of disruption, intelligence collection and prosecution.

The first recommendation is to establish NCTC as the standalone agency with the authority to conduct not just the strategic planning but the coordination and execution of the counterterrorism mission. The NCTC Director, who will report directly to the President, will have the authority, leverage and responsibility to task and direct strategic counterterrorism operations utilizing all the available elements of national power found in the interagency community. This recommendation will enable the counterterrorism community to prepare prioritized courses of action in the pursuit of terrorism subjects. It will force careful consideration of the requirements and actions needed concerning the collection, handling and disposition of intelligence information as evidence when judicial prosecution is the primary endgame goal.

In order to enact this recommendation strong leadership and weight of the Office of the President must advance the effort. The White House will need to draft and push the legislation required to grant NCTC the authority needed to exercise the “collaborative thuggery” needed to capitalize on the “spirit of collaboration” that exists in the counterterrorism community. Beneath the President, “champions” will be necessary, who share the vision to have a successful central strategic counterterrorism organization. Ideally, the champions will be the directors of the participating agencies who will bring their respective designees to shepherd the process through each respective organization. It is important for the President identify cohorts—those who will benefit and ally with the plan and the scoundrels—those who perceive a loss of clout, funding or power and will oppose the plan if not sabotage it. Through effective communication, the President must convey the message that will focus on accomplishing the shared goals and common strategic end game mission—that of protecting the nation from the modern day terrorism threat. By converting even just a few scoundrels into cohorts, a powerful stable of champions will emerge to counter the remaining detractors to the NCTC plan. Identifying a consigliore, a highly respected insider who can advise of the pitfalls and likely difficulties in making the execution strategy work will also be important. The

consigliore would also work to exert influence over the scoundrels in the equation by bringing them along in the process and giving them confidence their concerns are heard and best accommodated. Retired Chairman of the Joint Chiefs of Staff Colin Powell and former FBI Director Louis Freeh are examples of the high profile and well respected individuals who would be accepted as competent and fair to all those involved.

The second recommendation is to establish a legal U.S. preventative detention system utilizing the FISA court as outlined in Chapter V. This will provide the government with a critical counterterrorism tool to preempt attacks and obtain critical intelligence without jeopardizing judicial prosecution. It will facilitate the use of evidence identified and obtained as a result of interrogation of those detained. It will facilitate the use of the statements made by those detained in their prosecution as well as the prosecutions of their co-conspirators. It will incapacitate terrorist subjects from the fight while building a prosecutable case with available evidence. In order to enact this recommendation Congress must engage the American public in a considerable national debate in gain the support needed to create the required legislation. The President must lead this effort by inviting congressional leaders in calling for and establishing a bi-partisan 9/11 style committee to develop the final recommendations for the framework of such a legal regime.

The third recommendation is to fully and permanently integrate FBI counterterrorism agents into tier one Special Operations Command special mission units. This will bring an extremely valuable law enforcement capability to the U.S. special operations units tasked with pursuing high value terrorism targets (HVTs). Having federal law enforcement agents, which function from the outset as the collectors and handlers of the information obtained during the capture of HVTs, will significantly mitigate that information being inadmissible in a judicial setting. Federal law enforcement agents can also function as the “arresting agent” and provide a professional testimonial capability during the prosecution of captured HVTs, thereby protecting the identities of military personnel and intelligence agents. Federal law enforcement agents also bring the inherent skills of sensitive site exploitation, interpersonal communication, interrogation and building a case (or target set) from the evidence they collect. To enact

this recommendation, both the senior leadership of the FBI's National Security Branch and DoD's SOCOM should capitalize on the already excellent working relationship and designate a joint task force to enact the plan outlined in this thesis.

#### **D. CONSEQUENCES**

The cost of inaction or substandard reforms can range from serious to severe. A serious consequence is a terrorist subject not being indicted on charges commensurate with his actions and intentions. A more serious consequence is a convicted terrorist, such as Jose Padilla, receiving an inferior sentence that fails to adequately incapacitate the individual and the real threat he poses. A grave consequence is the possibility that a hard core terrorist leader, such as Khalid Sheik Mohammad, would have his case and charges dismissed due to procedural discrepancies, or worse, is found not guilty because key evidence is either thrown out or not available to the prosecution. A severe consequence is the execution of a terrorist attack that could have been prevented by the detention and interrogation of an operative based on classified information clearly indicating his complicity. Certainly, an attack that utilizes a weapon of mass destruction resulting in a significant loss of life and acute harm to the economic well being of the nation would be a calamitous consequence. However, perhaps the most ominous consequence would be the loss of confidence by the American people in their government and its ability to adequately protect them from the most apparent and dangerous of threats.

#### **E. UNRESOLVED QUESTIONS**

The complex issues presented in this thesis cannot be remedied solely by the recommendations it offers. Questions abound that require bold feasible solutions.

##### **1. What to Do About CIPA?**

One area discussed was the viability of the Classified Information Protection Act (CIPA) to adequately meet the demands of introducing and protecting classified information in civilian Article III court. As discussed in Chapter II, CIPA's intent was to protect against the disclosure of classified information by a defendant during an

espionage prosecution. While CIPA has functioned with a measured level of success in the prosecution of terrorism subjects there remains a significant need to modify CIPA regarding the introduction and protection of non-documentary classified information. CIPA needs to be modified in a manner that it would also offer protection of highly valuable sources and methods. However, as the U.S. seeks to balance its ability to protect its national/homeland security and provide fair jurisprudence, another question that should be considered is does the nation wants to continue to bend its civilian courts to meet the contemporary terrorism threat during a time of war? By attempting to conform the tested peacetime criminal courts to meet the uncommon challenges posed by an unpredictable and vicious enemy, does the nation ultimately risk both its civil protections and its security—not preserving either?

## **2. What Is the U.S. Policy and Criteria for the Use of the Military Commissions System?**

In October 2006, the U.S. government passed the Military Commission Act authorizing trial by Military Commission for violations of the Laws of War and other offenses. As presented in the case study of Suliman Al-Bahlul, since this option is legally available and is better suited to try foreign terrorists, shouldn't the U.S. have a defined policy on who will be tried by the Military Commission system? The recent controversial decision to move the trial of Khalid Sheik Mohammad and four other Al Qaeda co-conspirators from the Military Commission system in Guantanamo Bay to a civilian Article III court in New York begs the question of why assume the risks involved (Dienst, 2009)? The case study of shoe bomber Richard Reid and underwear bomber Abdul Mutallab begs the question that if they do not fit the criteria for the commission system, then who does? Shouldn't the U.S. have a clear policy that outlines who qualifies and will be remanded for trial by military commission unless other specified factors are present? Wouldn't an examination of policy creation and implementation in this regard eliminate a haphazard picking and choosing and the political factors that appear to be involved?

### **3. Why Not Make the Guantanamo Bay Detention Facility a Permanent Federal Prison for Terrorists?**

Since October 2001, the U.S. military installation at Guantanamo Bay, Cuba has been utilized as a holding point for many of the most sinister captured terrorist leaders, planners and operatives. The U.S. government has reportedly invested upwards of \$54 million in building a modern prison ranging from medium to maximum security (Bowker & Kaye, 2007). It has reportedly invested upwards of \$12 million for a judicial facility that is specifically built to accommodate military commission trials and the presentation of classified evidence (Bowker & Kaye, 2007). Guantanamo Bay is a secure location, evidenced by the nearly 50-year standoff with Fidel Castro's hostile communist regime on one side and the Caribbean Sea on the other. Capitalizing on the substantial investment already made in new infrastructure along with the offshore security it naturally provides, shouldn't the U.S. consider making the Guantanamo Bay facility a federal penitentiary for terrorist subjects, run by the Bureau of Prisons? Furthermore, should the recommendation for a legal, preventative detention system be enacted, wouldn't the Guantanamo Bay facility be the natural location to hold terrorism subjects, particularly non U.S. citizens capture abroad? Would it not be safer and less complicated to house the most dangerous of terrorism subjects outside the U.S. yet in a facility where the threat of escape or release (i.e., Yemen, Pakistan or Saudi Arabia) is nil?

Innovative feasible solutions to these questions can further advance the U.S. effort against global extremism. Perhaps by enacting the first recommendation presented above, a concerted, coordinated, strategic effort by an integrated, authoritative NCTC would produce just such solutions.

## **APPENDIX. THREE RECOMMENDATIONS FOR ENSURING THE END GAME**

### **CHAPTER I INTRODUCTION & SUMMARY OF THE RECOMMENDATIONS THAT WILL BE PRESENTED**

#### **A. RECOMMENDATION #1: UNITY OF COMMAND.....ESTABLISH NCTC AS THE COUNTERTERRORISM INTER AGENCY ORGANIZATION WITH AUTHORITY TO DEVELOP PLANS, ASSIGN TASKS, COORDINATE OPERATIONS AND DEVELOP DOCTRINE & POLICY**

1. The Need to Modernize the Counterterrorism Structure
2. The NCTC Solution, the Concerns & Possibilities
3. Modifying NCTC to Meet the Challenge
  - a. Utilizing the DOD example
4. The Process for Making the NCTC Solution Happen
5. The Pros & Cons of the NCTC Solution
  - a. Pros
  - b. Cons
6. Summary End Game Recommendation

#### **B. RECOMMENDATION # 2: INSTITUTE A LEGAL U.S. PREVENTATIVE DETENTION SYSTEM UTILIZING THE FISA COURT**

1. Dispelling the Misconception, a U.S. Preventative Detention System is Possible
2. Developing a Preventative Detention Framework that meets Disruption. Intelligence Collection and Prosecution Requirements.
  - a. The Wittes Preventative Detention Framework
  - b. Recommendations for Modifying the Wittes Model
    - (1) The system would include U.S. persons
    - (2) The system must have emergency authorization capability
    - (3) The system would provide an initial 25-day detention period. Six-month judicial review and a two-year limit.
    - (4) The system would utilize the FISA Court
    - (5) The system could implement a “cleared Grand Jury” concept
    - (6) The system will have a five-year sunset clause and regular congressional review
3. The Process for Making the U.S. Preventative Detention System Happen
4. Pros and Cons of a Legal U.S. Preventative Detention System
  - a. Pros
  - b. Cons
5. Summary End Game Recommendation

**C. RECOMMENDATION # 3: FULL INTERAGENCY INTEGRATION OF FBI AND SOCOM**

1. Threats of Purpose, Threats of Context and National Strategy Objective
2. Bringing the Law Enforcement Capability to the Special Operations Mission
  - a. Getting the Right Personnel in the Right Places
3. Pros and Cons of full FBI and SOCOM Interagency Integration
  - a. Pros
  - b. Cons
4. Summary End Game Recommendation

**D. SUMMARY**

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